Nos. 213 and 214.

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In the Supreme Court

Brf. of Brown & Henderson.

OF THE

United States.

Back for O. C.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

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Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

No. 214

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

Following the plaintiff, we unite the briefs in the two cases—Nos. 213 and 214; it must be remembered, however, that the same points are not involved. In case 214, the St. Louis Mining Company was Plaintiff in Error, and consequently none of the exceptions taken by the Montana Mining Company are involved in the appeal in case No. 214;—in fact the only point involved in that appeal is the right of the St. Louis Company to follow the

dip of the vein, known as the Drum Lummon vein, between the planes known as the 108 and 133 foot planes.

CASE NO. 213.

A map of the premises in controversy is attached to our motion to dismiss the appeal in case No. 213. This map shows the hanging wall as described both in the complaint and in the evidence; the foot wall is shown as described in the evidence of the witness Jenny; his evidence in that regard was stricken from the record, but it is found on p. 21 of the record in case No. 214, and the granting of the motion to strike was one of the exceptions taken by the St. Louis Company in that case.

However, it will be seen from the complaint that, although the two points at which the two walls of the vein left the St. Louis ground at its southerly end, the points of departure at the northerly end are not given—but it does appear from the record that the entire apex continues in the St. Louis ground for some distance north of the plane known as the 520 foot plane. We mention this, because a map filed by Plaintiff in Error in one of its briefs, is not correct at the northerly end thereof.

This is a writ of error to the Circuit Court of Appeals. Defendant in Error was plaintiff below and brought suit for trespass and conversion of ore taen from its mine by the defendant. Plaintiff owned the St. Louis Mining Claim and defendant the Nine Hour Mining Claim, lying side by side. The mine of the plaintiff, (Defendant in Error) the St. Louis, was patented prior to the issuance of the

patent to the Nine Hour. The St. Louis was the older claim of the two; located before the Nine Hour was located; and the notice of its location was recorded prior to the recording of the notice of location of the Nine Hour. (See Record, p. 3). At the time of applying for patent by the St. Louis the surveyor included a portion of the premises claimed by the owners of the Nine Hour. An adverse claim was made by the owners of the Nine Hour and suit was brought thereon. To prevent the delay caused by that suit and to compromise the same the superintendent of the St. Louis made a contract to convey the premises claimed by the Nine Hour back to the owners of the Nine Hour as a part of the Nine Hour claim. (Contract Record page 36.) The St. Louis obtained its patent and neglected and refused to convey. Suit was brought upon the contract to convey for specific performance. The suit was not brought by the assignees of the contract as such, but by the owners of the Nine Hour claiming that the contract was appurtenant and a part of the Nine Hour claim. (See Finding 8, page 42, and Finding 5, page 41.)

In the complaint the owners of the Nine Hour claim allege:

That the said contract was made on the 7th day of March, 1884, "to settle and compromise said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line of the said Nine Hour Lode Mining Claim and the said St. Louis Mining Claim." Record 34. The suit for the specific performance was determined

in favor of the owners of the Nine Hour claim in the State Court of Montana. As a condition of an appeal under the law of that state, the defendant in that case, plaintiff in this, Defendant in Error here, was required to execute and deposit with the clerk, a deed, the form of which was prescribed by the decree, record 43. This was accordingly done, and is found in the record, p. 10. It appears by this record that the entire premises heretofore claimed by the Nine Hour owners was thus deeded back to them and not any less part of it. There is nothing in this record tending to show that in making this compromise,

> "The purchasers in the interest of the plaintiff in error were surrendering a large part of the Nine Hour claim and accepting therefor an insignificant fraction that was justly their due," as contended by plaintiff in error in its brief in the Circuit Court of Appeals.

Developments have shown that within the St. Louis claim are two veins, one, the discovery vein, running substantially through the St. Louis claim from end to end, northerly and southerly, and dipping easterly, and that there is another vein, called in the record some times the "Drum Lummon" vein, some times the "Extra," some times the "Ancillary" and sometimes the "By Vein." This vein apexes for a long distance within the St. Louis mining claim and dips also easterly underneath the Nine Hour Mining Claim. A part of this vein, the apex of

which is wholly within the St. Louis, dips underneath the premises conveyed by the St. Louis above described to the Nine Hour, which premises are described herein, both in the complaint and in the general argument by way of convenience as the "Compromise Ground." So that we have the question presented as to the ownership of the ores lying underneath the premises so conveyed and called the "Compromise Ground," but the apex of which and the apex of the vein carrying the ore lies within and entirely within the St. Louis Claim. Under the description in the complaint the vein departs from the St. Louis claim into the Nine Hour claim at a southerly part thereof, and in the course of its departure the width of the vein is alleged to be twenty-five feet and carries the apex partly on the strike and partly on the dip. The court below awarded to the plaintiff the ores lying within the vein, the apex of which was wholly and entirely within the St. Louis Mining Claim. The court denied to the plaintiff any right to those ores lying within that part of the vein included within the width of the vein, the said twenty-five feet, although the St. Louis was the older claim.

Under these facts the defendant contended that the St. Louis had no right to any ores belonging to St. Louis claim apexing therein which did dip underneath the premises conveyed known as the "Compromise Ground." This constitutes the principal controversy in the case. The plaintiff insisted that the circumstances under which the deed was executed and delivered should be construed

as a part of it and the court ruled for the plaintiff. That is, that the original contract should be introduced and the record of the suit brought thereon, both as showing the circumstances under which the deed was executed and delivered, and aiding in its construction. This is a branch of the same principal question. It all turns upon the construction of that deed and the propriety of the admission of this evidence to this main issue.

Plaintiff in error made various and sundry objections of minor import which are discussed in the brief and of course will have to be answered by the defendant in error, such as to the admissibility of the evidence under the complaint of the location of the discovery vein. The plaintiff in its complaint had alleged that it was the owner of all the veins apexing within the St. Louis claim. To prove that ownership it proved the fact that the apex was within the claim, the direction and angle of its dip and that the discovery vein had the same direction and substantially the same angle and that the discovery vein extended from end line to end line of the mining claim.

The plaintiff in error contends in his brief that this particular fact tending to show the ownership must be specifically alleged. Defendant in error claims that the general allegation of the ownership is sufficient allegation to admit proof of any part of its title.

Some questions are involved as to the measure of damages. The plaintiff in error contends that certain ores

were enjoined from sale and therefore it has kept them ready to be delivered as ordered by the court in another suit. No evidence is shown where the ores are, or in what condition or what became of them. Part had been milled by defendant (Record page 30) and some have been mixed with waste and other material by plaintiff in error. (See p. 31 Cross-ex. of Burrill, superintendent of plaintiff in error and its witness). Plaintiff proved that they had been wrongfully extracted from the premises in question and their value. No tender has ever been made of these ores or their value and no acceptance of them. What had not been milled had been wasted. (Record p. 30.)

If the plaintiff in error is serious in its contention that this is a mitigation of damages the question is here presented, whether taking the ores and secreting them would be any defense in an action of trespass or trover. The request to instruct by defendant did not conform to the fact proven.

But the principal question in the whole controversy depends upon the first great issue. In executing the deed of the compromise ground under the circumstances did the deed convey vertical lines or did it convey simply the surface and such veins as had their apex therein, wholly or in part? Did that deed convey any part of the St. Louis claim or was it simply an admission as alleged in the complaint of the Montana Mining Company, Limited, that it was a conveyance of a part of the Nine Hour claim, making these claims stand before the court as if

the survey had originally been made not to include this compromise ground?

The complaint contains such a description of the St. Louis Mining Claim by metes and bounds and courses that it can be readily drawn, or a map made thereof, and it is as follows (See pp. 2 and 3):

Beginning for the description of lots Nos. 54 and 55 A, at corner No. 1, a granite stone 16 x 12 x 12 inches, marked '1 M. C. 54,' a mound of stone alongside, from which the quarter section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian, bears south 74 degrees and 15 minutes east 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 x 14 x 12 inches, marked '54 M. C. 55 A,' 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 ft. distant 1097 ft. to corner No. 2, a slate stone 20 x 12 x 5 inches, marked '2 M. C. 55 A,' a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner

No. 3, a slate stone 14 x 10 x 4 inches, marked '3 M. C. 55 A,' a mound of stones alongside, from which the south-east location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 x 9 x 7 inches, marked '4 M. C. 55 A,' a mound of stones alongside, from which the south-west location corner bears south 79 degrees west 182 feet distant.

Thence, fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked '5 M. C. 55 A,' a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees, 45 minutes east, 529 7-10 feet distant, intersects said township line, a granite stone 18 x 16 x 7 inches marked "54 A 54 M. C." 1069 feet to corner No. 6, a granite stone 18 x 12 x 6 inches marked "6 M. C. 54 A." from which a fir tree 13 inches in diameter marked "6 M. C. 54 B. T." bears north 15 degrees, east 24 feet distance, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T." bears south 54 degrees, east 21 5-10 feet distance.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes, east 515 5-10 feet to corner No. 1 of Lot No. 40, the Drumlummon Lode Claim, 579 feet to corner No. 1, the place of beginning; said

lots Nos. 54 and 55 A extending 1500 feet in length along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three hundredths of an acre.

It also contains (see page 3) such a description of the thirty foot strip or compromise ground that the same could be readily laid off on the ground enclosed within the above description, and it is shown to be that portion of the premises included within the exterior limits of the St. Louis claim described as follows:

Commencing at a point on the east side line of the St. Louis Mining Claim 60.5 feet in a northerly direction from corner No. 2; thence in a southerly direction along said line between corners Nos. 1 and 2 to corner No. 2; thence along the line between corners 2 and 3 to corner No. 3; thence along the southerly line of the St. Louis lode thirty feet; thence in a northerly direction and on a line parallel to the line between corners 2 and 3, 230 feet to the point of beginning.

Making a drawing of the St. Louis Lode Claim and the thirty foot strip from the description given in the evidence we have a figure as found in themap filed with and in our motion to dismiss the appeal in this case.

In this description that portion of the description given in the complaint which fixes the point of beginning is not given, because with the tracing of the St. Louis claim the fixing of the point of beginning is not difficult.

The complaint also alleges (see pages 1 and 2) that the

plaintiff at the times mentioned in the complaint "was and now is, the owner of, entitled to, and in the actual possession and occupation" not only of the St. Louis Quartz Lode Mining Claim, but also "of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Lode Mining Claim," and this allegation is admitted by the answer of the defendant (see page 7, paragraph 1).

It is also alleged that the St. Louis Mining Claim was discovered, located and recorded prior to the discovery and location and recordation of the Nine Hour Lode Mining Claim and that the patent to the St. Louis Mining Claim was issued prior to the patent to the Nine Hour Lode Mining Claim (paragraph 3 of complaint, p. 3), and this is admitted by paragraph 1 of the answer, page 13 of the record.

One of the veins which we have thus alleged that we are the owners of, and which has a portion of its top or apex within the St. Louis Lode Mining Claim as alleged in the paragraph heretofore quoted, is then described so that it is shown that the hanging wall crosses the east side line of the St. Louis claim between corners Nos. 1 and 2 and at a point not more than 520 feet

south of corner No. 1, and traveling in a southerly direction it remains wholly in the St. Louis ground until it again crosses the east side line of the St. Louis claim of which the west boundary line of the thirty foot strip is a part at a point 108 feet from the point at which the said west line of the thirty foot strip intersects the line between corners Nos. 1 and 2 of the St. Louis claim.

It is also shown that this vein dips to the east and consequently the foot wall must line westerly of the hanging wall, and that the foot wall crosses the line last above described at a point 25 feet south of the point at which the hanging wall crosses said line. The general course of this vein is also shown on the plat which we have inserted in this brief, and the same is inserted there by means of the description contained in the complaint, (See pages 3 and 4), and from the evidence of the witness Jenny. The east line is described to be the east side line. The planes are also described, so that it would appear from the face of the complaint that the portion from which the ore was taken is from that portion of the vein which, on the dip, is entirely within the end lines of the St. Louis claim.

It also appears from the admission made by the replication that the execution and delivery of the deed mentioned in the answer was made under these circumstances: that the predecessor in interest of the defendant having applied for a patent to the St. Louis Mining Claim included in his said application the premises

known as the thirty foot strip or compromise ground; that thereupon the predecessor in interest of the plaintiff in error filed an adverse claim, and an action was brought by the predecessor of the plaintiff in error against the predecessor of the defendant in error to determine the right of possession to the said thirty foot strip; that thereupon an agreement was made by which the predecessor in interest of the defendant in error agreed to convey said strip to the predecessor in interest of the plaintiff in error; that afterwards an action was brought by the plaintiff in error as plaintiff against the defendant in error and Charles Mayger, one of its predecessors, for the purpose of compelling the defendant in error to execute and deliver to the plaintiff in error a deed of the said premises known as the thirty foot strip or compromise ground, and that in said action it was found and determined by the court, as a matter of fact, that the said thirty foot strip or compromise ground was at all times a part of the said Nine Hour Lode Claim, and was by the parties to the bond or agreement to convey agreed to be a part thereof, and that the agreement to convey was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundaries of which claims had been and were at the time of the execution of the agreement to convey in conflict, and that the deed mentioned in the complaint was the deed executed and delivered in accordance with the judgment of the court based upon said

finding (see replication, pp. 12 to 14), and this further appears in the proof, pages 32 to 45.

There were several different blocks of ore removed by plaintiff in error from the portion of the vein described, known as Nos. 8, 9, 10, 11, and it appears from the evidence in the case, and especially from the maps, that the ore known as block No. 10 was a part of the vein, the entire apex of which was within the St. Louis ground proper, and on that portion of the dip of the vein which is easterly of the perpendicular plane drawn through the easterly side line of the compromise ground, being a portion of the dip of the vein between the planes known as the 108 foot and the 133 foot planes, but not included between that section of the earth bounded by perpendicular planes through the boundary lines of the said thirty foot strip or compromise ground, but lying easterly of the east side line of the said strip projected vertically downward.

It will appear from the evidence that the 400 foot level has been run by the defendant company, plaintiff in error, through that portion of the dip of the vein in question, no portion of which was included in the thirty foot strip or compromise ground, and which was wholly within perpendicular planes passed through the end lines of the St. Louis claim.

It appears from the record also that in the opening of its case the defendant in error herein offered in evidence the papers mentioned in Assignment 10 of Error, and that the plaintiff in error objected to the same upon the

following grounds: because it was not the proper time to offer the same (see page 19.)

It appears further in evidence that plaintiff in error milled forty or fifty tons of the ore which it had taken out from the vein as alleged in the complaint and as shown at the trial. (See p. 30.)

It will also appear that the plaintiff in error mixed a portion of the ore by it taken from the premises belonging to the defendant in error with other ores or waste belonging to the plaintiff in error (see pp. 30 and 31).

It appears from the evidence that only a portion of the vein in controversy between the plane known as the 520 foot plane and the plane known as the 108 foot plane did, on its dip, pass under or within the premises known as the thirty foot strip or compromise ground (see plaintiff's exhibit 1).

It will also appear from the record that the assignment of error No. XVII, which is instruction No. 2, was excepted to by the plaintiff in error in writing and the exception is as follows: 'To the giving of which said instruction the defendant then and there objected for the reason that there was no evidence that the defendant had prevented the plaintiff from ascertaining the true value of any of the ore, and that said instruction was misleading to the jury, and does not correctly state the law applicable to the case therein,' (See p. 47).

It appears from the testimony of the witness Mayger (p. 17) and that of the witness Parks (pp. 20 and 21) and

that of the witness Jenney (pp. 23 and 24) that the discovery vein of the St. Louis claim runs lengthwise with the claim as located, that it is developed in a southerly direction to within about ninety-five feet of the south end of the claim as located, and the said witnesses further testified that, in their opinion, it runs out of the north end of the claim and also out of the south end of the claim.

ARGUMENT.

Counsel for plaintiff in error in their brief in the Circuit Court of Appeals grouped together assignments of error Nos. 1, 2, 3, 4, 6, 9 and 16, and we will answer them in the same way. No. 1 refers to the sufficiency of the complaint, No. 2 is to the effect that it was error to admit evidence that the discovery vein ran with the length of the claim: No. 3 was a general objection to any evidence as to the discovery vein; No. 4 was to the evidence showing that the several planes known as the 520, 108 and 133 foot planes were parallel to the end lines as shown in the patent; No. 6 and No. 9 were an objection to evidence tending to show that the discovery vein ran parallel to the side lines substantially from end line to end line and No. 16 was an instruction to the effect that the evidence shows that the discovery vein of the St. Louis Claim extends substantially from one end line to the other. As to this last there was no evidence to the contrary, and we assume from this grouping that counsel

has no ground of objection except that this was not alleged in the complaint.

I.

The action is one of trespass on real estate and for damages resulting from the trespass. And the complaint in such an action would be similar to one in ejectment.

The practice in Montana is under what is known as the Code of Reformed practice, and the complaint must contain "A statement of the facts constituting the cause of action, in ordinary and concise language."

The facts referred to are ultimate facts; not the evidence upon which the ultimate facts are based; so in an action of ejectment, the complaint is sufficient if it states that the plaintiff at the time complained of was, and is the owner of the property and that the defendant prior to the commencement of the action ousted him therefrom.

McKay vs. McDougal, 19 Mont. 493.
Payne vs. Treadwell, 16 Cal. 221-244.

The complaint in that case alleged merely that the "plaintiffs are the owners in fee as tenants in common, and have the lawful right and entitled to the possession" of the described premises, and then further alleged the ouster.

See also Daly vs. Sorocco, 80 Cal. 367.
Johnson vs. Vance, 86 Cal. 128.

So inthis case all that was necessary to be alleged was

that, at the times complained of, the plaintiff was the owner of the property in question, and the facts constituting the trespass; these were the ultimate facts which follow evidence of anterior facts.

Counsel are quite correct in assuming that we do not say that "there is any special provision in the Code of Civil Procedure specially authorizing a plaintiff in an ejectment suit to simply allege ownership of the real property in controversy, in his complaint, and say that such allegation shall be sufficient." (See p. 41 of appellant's brief). Under no circumstances and in no jurisdiction would such an allegation state a cause of action against anyone. No wrong is alleged to have been done. But the allegation is sufficient to show title and ownership and to allow proof to sustain such ownership.

But we do most emphatically assert that, in every state in the Union having a practice act similar to ours, in an action for trespass either upon real or personal property, in an action of ejectment, in an action of trover, or of conversion, or of replevin, the plaintiff does not have to plead, that it is not proper practice to plead, his title; in that respect, his complaint is sufficient when it states that at the time complained of or at the time of the commencement of the action for ejectment, replevin, etc., he "is the owner of the property." That fact, that ultimate fact of ownership, he must prove at the trial, and he may prove this by presumptions which the law makes, or he may prove it by any other legal evidence of ownership.

In this case we have alleged that we are and were at the times complained of the owners of the St. Louis Quartz Mining Claim, "and of the quartz and precious metal contained in any and all veins through their entire depth, the tops or apexes of which lie within the surface lines of the said St. Louis Lode Mining Claim, although such veins may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line, etc. (pp. 1 and 2). Then one of these veins is particularly described, and it is alleged that as to different portions of this vein, which portions are also particularly described as having "their top or apex within the St. Louis Mining Claim" and of which the plaintiff has already alleged ownership, and of one of which it again asserts ownership, as to this vein or portions thereof, it alleges the wrongs complained of, and the damage (pp. 3 and 4); it is also asserted that the St. Louis claim is a patented claim, and the description of the vein shows that these portions of the vein dip underneath the east side line of the claim, and into ground owned by the defendant which is a junior location, and that there the wrong was done.

The mere allegation of ownership is sufficient; but here is shown in the complaint a patented claim, with the presumption that the discovery vein runs lengthwise of the claim; here is a by-vein, which also runs lengthwise of the claim; here is a senior locator as against a junior locator, the latter of whom has taken ore from that portion of a vein which

has its apex within the senior location and is also within perpendicular planes passed through the end lines of the senior location—well within those planes—well within planes parallel to the end lines, the most northerly of which is 520 feet south of the north end line, and the most southerly of which is 270 feet north of the south end line. Every fact which constitutes our title is alleged: if counsel for defendant found anything indefinite in the complaint by reason of the expression "parallel end lines" or for any other reason, it was, as we have seen, their duty to demur to the complaint, and in that demurrer to specify wherein the complaint was indefinite.

However, the mere allegation of ownership is enough. See authorities cited below, in addition to those above cited.

The trouble seems to us to be that counsel confuse that which must be proved with that which must be alleged. We are led to this belief from the language which counsel quote: "Hands off, of any and every thingwithin my surface lines * * * until you prove you are upon * * a vein which has its apex within your surface claim".

His Honor, Judge Hawley, does not say "until you allege".

One of the main propositions in the contention of counsel is, that the allegations of the complaint are so repugnant in a material matter as to render it insufficient to support the judgment. To maintain this position it is contended that the allegation of title, possession and right of possession of defend-

ant in error, to the Saint Louis Lode Claim and of all veins, lodes or ledges having their apexes within the surface boundaries of the claim and all mineral contained in such veins, is utterly irreconcilable with the averment that plaintiff in error owns, possesses, and is entitled to possession of the Compromise Strip, as a part of the Nine Hour Lode claim, "together with all the mineral therein contained." To further elucidate this position, it is claimed that because the vein, lode or ledge containing the minerals for which judgment was recovered, dips under and beneath the surface of the Compromise Strip, it is nevertheless included in the exception of the Strip, by the pleading, because of the language, "together with all minerals therein contained," notwithstanding the vein, lode or ledge had its apex outside the Compromise Strip, and within the surface boundaries of the Saint Louis Lode claim.

The inwardness of the proposition is, that something is conceded by the pleading to belong to the Compromise Strip which did not belong to it as a part of the Nine Hour Lode claim under the laws of Congress, by importing into it the qualities of a title at common law. If it be true that "the mineral therein contained" is to be construed arbitrarily to mean all mineral beneath the surface of the Compromise Strip unlimited and unrestrained by the right of defendant in error to the minerals in the vein having its apex in the Saint Louis Lode claim, then there is repugnancy in the sense claimed by counsel for plaintiff in error. If the language, however, is to be con-

trolled by the Act of Congress in defining the right conveyed, and not the rules of the common law, then there is no repugnancy as asserted by counsel, and the allegations are made consistent and reconcilable.

It is undoubtedly true that the "words of a contract as stated in a declaration must have the same legal construction as they would in the contract itself," and this is the canon of interpretation relied upon by counsel of appellants, as was contended for in the court below. It logically follows that until the construction given the covenant, judgment and deed, comporting as it does with the allegations of the pleading, is reversed, no repugnancy can be said to exist. Hence the question is involved in the construction of the deed, and not the pleading, as it will stand or fall by such construction. It is conceded, as stated by counsel for plaintiff in error in a brief filed in the Circuit Court of Appeals, that "It is impossible not to perceive at the first glance that the language of the exception in the plaintiff's complaint was taken from the deed itself. It is a literal copy of the deed to that extent." Evidently the author of that plea did have in view the fact that the pleading would be construed in this respect as the contract would be construed, and that the best way to conform to the rules would be in adopting its language. Admitting all that has been said by counsel for plaintiff in error upon this point, and assuming that the doctrine announced is correct, it will have no application unless the words "together with all the mineral therein contained" are to re-

ceive a common law construction, instead of a construction under the Act of Congress, the common source of title of both plaintiff and defendant in error. The pleading interpreted under the latter, as applied to a quartz lode claim, or fractional part of it as such, is a model of perfection, and is supported by the interpretation of the deed made by this court, and harmonizes in all respects with the doctrine announced by the Supreme Court of the United States in Delmonte Mining and Milling Company vs. Last Chance Mining and Milling Company, 171 U. S., 55.

So long as it is maintained that the Saint Louis Lode claim is entitled to extra lateral rights to the portion of the vein apexing within the surface boundaries of that claim, and damages for the mineral extracted therefrom, so long must the complaint be upheld as a true and correct construction of the covenant, judgment and deed.

Assuming that the authorities cited by counsel are applicable to the complaint on account of the construction given the covenant, judgment and deed, they are of great importance in considering the effect to be given the answer upon the part of plaintiff in error. If the answer admits the title of defendant in error to the mineral in the vein, lode or ledge in question, in so far as it has its apex inside the surface boundaries of the Saint Louis Lode claim, notwithstanding its dip beneath the Compromise Strip, then the affirmative allegations of the answer must be reconciled with this admission, or else there is fatal repugnancy of a very malignant character.

"An affirmative allegation of the complaint which is not specifically denied, being admitted (Hill's Ann. Laws, 94), an affirmative allegation of the answer inconsistent therewith is properly stricken out."

Capital Lumber Co. vs. Learned et al., 36 Ore. 554.

The authorities cited by counsel concur in the proposition that the least can be said is that they would neutralize each other, and this would leave the allegation undenied. What, then, can be said where there is an express admission of an allegation of the complaint, as is the case here? In such case the new matter is rendered nugatory, and no issue is raised. Judged by the authorities cited by counsel for appellants and determined by the logic of the argument of their brief, how stands this matter under the complaint and answer? In so far as the vein, lode or ledge in question is concerned, it is expressly admitted that defendant in error is entitled to it, and to the ore and precious metals contained in it, in its dip beneath the Compromise Strip, and that is just what is involved. Paragraph II of the amended supplemental complaint reads:

"That at the times hereinafter mentioned, this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the Saint Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious minerals contained in any and all

veins, lodes and ledges of mineral bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of said fractional portion of said Saint Louis Lode Mining Claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of the surface of the said Saint Louis Quartz Lode Mining Claim, which is situated in Ottawa Mining District, in the County of Lewis and Clarke, and State of Montana, and more particularly described as follows, to-wit:" See Record, pp. 2 and 3.

And the answer admits this. See paragraph 1.

Besides, if a more liberal view is taken of both complaint and answer, the construction given the covenant, judgment and deed in the complaint is correct, and that given them by the new matter in the answer is erroneous and may be disregarded. Plaintiff in error in its brief, filed in the court below, says "Allegations of fact by the pleadings repugnant to the correct construction of the contract may be disregarded," and at top of page 21 authorities are cited to support this proposition. They are applicable to the complaint, but under the admission of the fact that defendant in error was at the time of the alleged trespass, "and now is the owner of, entitled to, and in the actual possession and occupation" of the premises involved, as matter of pleading by force of the statute it becomes an admitted and incontrovertible fact.

The answer, page 13, Paragraph 1, reads: "It admits the allegations in paragraphs numbered 1, 2, and 3, of the said second amended and supplemental complaint."

Comment is unnecessary. If the new matter is consistent with the admission, there is no repugnancy. If it is inconsistent with it there is repugnancy and the admission prevails. And so it is: the claim of title under the covenant, judgment and deed to the minerals, admitted to belong to the defendant in error, leaves the allegations of the complaint undisputed, and the judgment should for that reason remain undisturbed. The only theory upon which it could be reconciled is that the plaintiff in error might have ore beneath the surface of its claim not contained in the vein, lead or ledge apexing in the Saint Louis Lode claim; but as to that defendant in error has brought no action, and it is in no way involved. The sum and substance of the estoppel sought to be pleaded is, that the title to the minerals in the vein apexing within the surface boundaries of the Saint Louis Lode claim has been conveyed by the deed to plaintiffs in error, and was and is on that account in plaintiffs in error, and not in defendant in error, in the face, as we have seen, of an express admission in the answer to the contrary.

We insist, therefore, that there was no issue to try under the pleadings, except as to the actual trespass and the damages, and that the claim of title by plaintiff in error under the covenant, judgment and deed is of no consequence under its theory of the pleadings. Whatever

may be the construction of these documents, no title has been asserted under them.

We have dwelt at some length upon this subdivision of our brief, because it not only answers counsel's contention as to the sufficiency of the complaint, but it answers also their contention as to the "admission of irrelevant testimony."

We add other authorities holding that the allegation of ownership is all that is necessary.

Souter v. Maguire, 78 Cal. 543.
Gage v. Kaufman, 133 U. S. 471.

The above was a suit in equity—the allegation was that the plaintiff was seized in fee simple; and it was held that the allegation "is a sufficient allegation that he has the possession as well as the title".

In Stephen on Pleadings, it is so stated as the rule at common law.

See Stephen Pleading, Sec. 175.
Ehrmantrout v. McMahon, 78 Wis. 138.

From the foregoing, and from the authorities above cited it follows 'as the night the day' that the objections to the evidence concerning our discovery vein, to objections to the evidence to show that the so called 520, 108 and 133 foot planes were planes parallel to perpendicular planes passed through the end lines of the claim, to objections to the evidence tending to show that the discov-

ery vein, the vein upon which the patent was based, ran parallel to the side lines and extended substantially from one end line to the other, were not well taken. The facts which this evidence tended to prove were the evidence of our ownership of the vein in question, were part of our chain of title to this vein to the same extent as would be deeds to a town lot.

However, as we have shown in the statement of facts, the complaint shows a mining claim such as appears in the figure thereof drawn from that description in the map filed in this case on our motion to dismiss the appeal. It shows that the claim as it runs north and south is about 1495 feet long and 579 feet wide; and it also appears that the St. Louis Claim is a patented claim. The presumption is in favor of the regularity of the patent, and it will be presumed as is shown by the authorities cited below, that the discovery vein of the claim runs in its general course lengthwise of the claim. This presumption is sustained in the complaint by designating the east line as the east side line of the claim. The words 'projected parallel end line' are familiar expressions and well known to mean lines drawn parallel to the end lines, and these projected parallel end lines can be readily placed by any one drawing a diagram of the St. Louis Claim from the description contained in the complaint, and of course it follows that all portions of this vein between these planes would also be between perpendicular planes passed through the end lines of the claim just as readily as the proposition is grasped that the greater

includes the less. The presumption is in favor of the regularity of the patent and that the end lines as established by the locator are actual end lines of the claim until the contrary is shown, and also that the side lines as established by the locator are the side lines of his claim until the contrary is shown.

Del Monte Mining Co. vs. Last Chance Mining Co., 131 U. S., p. 89, where the following language is used by Justice Brewer:

> "Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines."

The authorities cited by counsel upon this point are authorities upon the effect of evidence as to the rights established by the evidence, but are not authorities to the effect that in such a case the complaint would have to allege all of the facts constituting either the source of plaintiff's title or the facts which constitute him the owner of the property in controversy. This allegation of ownership would overcome any presumption if there is such a presumption that the owner of the surface is the

owner of all the ores thereunder; and for the same reason the position taken by the plaintiff in error, that, because the complaint states that this vein enters and departs through the same line, it fails to state facts sufficient to constitute a cause of action, is not well taken. Our ownership is alleged, and whether we own it or do not own it depends upon the evidence upon which we base our title to it, in fact, the ownership of plaintiff of the entire portion of the vein from which the ore in controversy was taken, is not only alleged, but is admitted by the answer: See paragraph II of Complaint (page 1) and paragraph 1 of answer (page 7).

In the Circuit Court of Appeals, the plaintiff in error laid much stress in argument that the complaint was uncertain and indefinite in that, it does not appear therefrom what is meant by the expression "projected parallel end lines". As we have stated, the expression is one often used in mining law to designate lines drawn parallel to the end lines of the claim; the Circuit Court of Appeals had no difficulty in understanding the meaning of the expression, and we apprehend this Honorable court will not either. The witness Keerl explained fully what these lines were. (Page 18).

Moreover, if the plaintiff in error found any difficulty in understanding the expression, it was its duty to demur to the complaint upon the ground that the same was "ambiguous, unintelligible, or uncertain", and failing so to do, it can not predicate error upon any such ground.

The Code of Civil Procedure of Montana provides as

follows: "Sec. 680. The defendant may demur to the complaint within the time required in the Summons to answer, when it appears upon the face thereof, either: (1) That the court has no jurisdiction of the person of the defendant, or the subject of the action, or; (2) That the plaintiff has not the legal capacity to sue; or, (3) That there is another action pending between the same parties for the same cause, or, (4) That there is a defect or misjoinder of parties, plaintiff or defendant, or, (5) That causes of action have been improperly united; or, (6) That the complaint does not state facts sufficient to constitute a cause of action; or (7) That the complaint is ambiguous, unintelligible, or uncertain.

Sec. 681. The demurrer must distinctly specify to the complaint, otherwise it may be disregarded. An objection taken under Subdivision 1, 3 or 6 of Sec. 680 of this Code, may be stated in the language of the Subdivision; an objection taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

Sec. 685. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

No demurrer was filed to the complaint upon which the trial of this cause was had.

This action was commenced before the Code of Civil Procedure was adopted in 1895; but the Practice Act in

force at the time of the commencement of this action was identical with the present act so far as these questions are concerned; and the amended complaint and rules concerning demurrers thereto were governed by the Code of Civil Procedure above cited.

See Kimpton vs. Jubilee Placer Co., 22 Montana 108.

The defendant having failed to demur under Subdivision 7, or at all, to the amended complaint, it is deemed to have waived the objection.

Even had a demurrer been filed, it would have availed nothing unless it specifically specified wherein the complaint is ambiguous, uncertain or unintelligible.

Jacobs Sultan Co. vs. Union M. Co., 17 Mont. 61.

Moreover by answering, the defendant would have waived any demurrer which it might have filed.

Moreover, the evidence of the witness Keerl cured any ambiguity or uncertainty.

Spencer v. Mont. R. R. Co., 11 Mont. 164-7.

The cases cited by the counsel effectually dispose of the objection to the effect that the vein in question enters and departs through the same side line. In the first place it was not alleged to be the discovery vein. It was alleged that plaintiff was the "owner" of it. The argument as to the sufficiency of that has already been made. It must be assumed that we are the owner in some proper

manner, the fact being alleged. Being a by or ancillary vein as shown by the evidence we had the right to recover upon it to the entire extent that we had the right to recover upon the original vein. The plaintiff the St. Louis company is entitled to the Drum Lummon vein to its entire extent from the north end line to the south end line of the St. Louis. We requote what counsel quotes on p. 34:

> "First the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establishes the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines, and those which he

called end lines are in fact side lines, and this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet on the vein, lengthwise of its course, to any depth below the surface although laterally its inclination shall carry it ever so far from a perpendicular. Mining Company vs. Tarbet, 98 U. S. 463-468."

"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

In other words, it is not necessary that the by-vein extend from end line to end line or that it cross either end line. It is not necessary to allege that the discovery vein or any vein crossed either end line. This is determined by the case of

Del Monte vs. Last Chance Mining Co., 171 U. S. 55.

It is sufficient that the strike of the vein runs with the mining claim to the extent that the course of the vein runs along the same direction of the mining claim; so far the owner of the mining claim has the right to follow it upon its dip. If the discovery vein runs from end line to end line as in this case he takes all veins for that en-

tire distance. If the discovery vein is like the Drum Lummon in this case extending along the same direction as the mining claim and running with it, and if the apex is only a part of the way within and a part of the way without the limits of said claim then the owner of the apex could take so far as it lay within the mining claim although it should depart from the same side line.

Tyler vs. Sweeney, 157 U. S. 54 Fed. 284.
Last Chance vs. Tyler, 61 Fed. 558.

All that was required in the Tyler-Last Chance case was that the vein should run with the claim. The same contention was made in this court by the distinguished counsel for the Last Chance Mining Company, that because it passed over the side line there could be no extra lateral rights and this court held that it was sufficient if the mining claim was laid along the strike or course of the vein; so far as that question was involved, it was sustained by the Supreme Court and by the case of

Del Monte vs. Last Chance Mining Co.

The quotation from the Del Monte case (ante) certainly contradicts the statement of counsel for plaintiff that "in no case yet decided, has it been held that a patent to a mining claim raises a legal presumption" that the vein upon which the location of a mining claim is based, "its discovery vein, passes through the claim lengthwise of the claim." (See p. 22 of their brief). It seems to us that this Honorable Court has emphatically said, by the language

quoted from the Del Monte case, and has affirmed it in the Walrath case, that the only exception to the rule that the end lines as located are the actual end lines of the claim, and that the side lines as located are the actual side lines, is where or when the fact is shown to be contrary to this presumption—where or when it is developed (actually shown) that the location has in fact been placed not along, but across the course of the vein.

As appears in this case, this vein from which the ore was extracted is not the located vein—it appears that it was and is in fact "a by-vein"—and as such is subject to and controlled by the rule stated in the Walrath case, which rule affirms the four rules (or propositions) stated in the Del Monte case, and adds to the mining law the following proposition: "These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

Applying the four rules stated in the Del Monte case and the additional rule just quoted from the Walrath case, to the facts in this case, certainly it cannot be claimed that defendant in error has no extralateral rights in the vein in question.

The presumption not only is that our claim is located lengthwise of the located vein—but the facts show that the located vein runs lengthwise through the whole claim; See the evidence of the witness Jenny (pp. 23-24), and the witness Parks (pp. 20-21); who says that the Discovery veins "runs generally parallel to the side lines",—again

he says, "On the south end it has been developed within seventy feet,"—again he says "it crosses the south end line. Northerly it is followed into the sixty five foot shaft and 60 to 80 feet beyond. I think it runs out of the north end of the claim."

See also the evidence of the witness Mayger (p. 17). The evidence shows plainly that the vein not only runs lengthwise of the claim, but also runs the full length of the claim and through its end lines.

These end lines, then, determine—these end lines of the original vein—"shall be the end lines of all the veins found within the surface boundaries."

See Walrath v. Champion M. Co., 171 U. S. at p. 308.

Supposing, however, for a moment that the vein from which this ore was taken, was and is the vein, known as the "Located Vein", or as the "Discovery Vein",—still we maintain that would have extralateral rights upon it.

Counsel do not state the rule (See p. 20 of their brief) as we understand it to be, as applied to the facts in this case.

The rule as stated by the court, the rule which this court says determines what are the end lines—that rule does not state that the end lines are those lines which are 'crossed by the Discovery Vein';—but that rule declares that "the end lines of the location as the locator places them" are his real end lines, except where "it is developed

that in fact the location has in fact been placed not along, but across the course of the vein".

In fact in the Del Monte case we are reminded very forcibly that nowhere does the law require the vein to pass through any line, and that a vein may have its beginning and ending within a claim, and the locator would still have his extralateral rights. And in that case—in the Del Monte case, the rule is not stated as counsel state it in their brief; it could not have been. Counsel, speaking of end lines, and extra lateral rights, ask—"And how is this to be shown?"—and then counsel answer their own question as follows—"By showing which of these lines is crossed by its discovery vein on its course through the claim. The end lines are not those lines which the locator has called such in the location of his claim but they are such as are actually crossed by the discovered vein on its strike" (p. 20, brief of plaintiff in error).

And to sustain their answer to their own question, counsel cite the Del Monte case, in which the vein "actually crossed" one end line and one side line; and still the owner of the claim was declared to have extra lateral right bounded only by his end lines. Again in Clark v. Fitzgerald, the vein crossed one end line and a side at a point about mid-way between the two end lines; and extralateral rights were granted,—and i nneither case did the side line determine the extra-lateral rights.

The rule stated by this court is in effect this: The course of the located vein as it lies within the claim determines which are the end lines and which are the side

lines; if that general course is lengthwise of the claim, the end lines as located are the actual end lines of the claim; on the other hand, if that course is more across the claim than lengthwise of it, then the side lines as located become the actual end lines.

Let us examine then the facts as shown in regard to this vein, still assuming (contrary to the facts) that it is our discovery vein. We must remember that the vein dips toward the east, away from the claim—so that the foot wall, at either end, will not pass out of our claim until after the hanging wall does; beginning then at the south end, the foot wall, as alleged in the complaint, passes out at a point 133 feet south of corner No. 2, which corner is 403 feet north of the corner No. 3, the S. E. corner; at the northerly end, both of the walls are within the claim at a point 520 feet south of the N. E. corner 520 foot plane, it still travels closely along the east side (Cor. No. 1). Assuming that it passes out entirely at the line of the claim 730 feet, and, as shown by scale, it never gets further away from the east side line than about 60 feet.

Can it be said of such a vein that it does not lie more lengthwise of the claim than crosswise of it? It certainly lies very much more lengthwise of the claim, than does the vein in Clark v. Fitzgerald: certainly its course, its general course is lengthwise with the claim as located; and, consequently, even if this vein was our discovery vein, we would have extra lateral rights.

But as we have said, this is not and was not our Dis-

covery vein—that vein ran almost parallel with the side lines—almost at right angles "to the lines marked on the map 3 and 4 and 1 and 6" (See p. 17, evidence of Mayger), which are the ends of the claim; and as we have seen it runs through both end lines. These lines then, the end lines, the real as well as the located end lines of our located vein, "shall be the end lines of all the veins found within the surface boundaries".

Walrath v. Champion M. Co., 171 U. S., at p. 308.

And from this we claim that points III, IV and V of counsel's argument are against the law; we claim that the complaint having alleged our ownership of the vein in question between the planes mentioned, the evidence complained of was properly admtited, because it was the evidence of our ownership.

II.

The next point asserted by the plaintiff in error is as to the so-called estoppel by deed. In this connection it may be well to remember that the defendant in error in the court below was confined to the proof of ore extracted on the dip of the vein between the 520 foot plane and the 108 foot plane; that is to say, it was confined to that portion of the vein, which had its entire apex within the boundaries of the St. Louis Mining Claim, exclusive of the thirty foot strip; that is to say, between these points both the hanging wall and the foot wall were entirely

within the surface ground of the St. Louis Mining Claim, exclusive of the thirty foot strip, and it was shown by the evidence of the witness Jenney and the witness Parks that the discovery vein of the St. Louis claim was not the vein in question, but was a vein running very nearly through the center of the St. Louis claim and almost through the entire length of the St. Louis claim as described by the locator and as patented, and, that, in the opinion of these witnesses, who were shown to be well versed in the formation and history of veins, and who had made an examination of this vein, this vein passed through the north end line and also through the south end line of the claim.

Now, in considering this subject we will consider what the rights of the St. Louis company are irrespective of the deed to the thirty foot strip. It is asserted by counsel that inasmuch as the vein enters and departs through the same line, there can be no extra lateral rights to the vein on its dip. We do not consider that this proposition is correct. We do not believe that even if this were the discovery vein that the rule of law for which counsel contends is correct, for even if this were the discovery vein, it runs lenghtwise with the claim as located, its general course and direction is with the length of the vein as locatedand not crosswise thereof, and that would be enough to bring the case within the rules announced in the Del Monte case, for there is no law which requires that the vein to be located shall cross any line whatever. There is no law which prohibits it entering a side line and cross-

ing an end line, and no law which prohibits it from entering a side line and departing from the claim through the same side line. The course of the vein and its general direction, when that is shown, determines what are side lines and what are end lines, and that irrespective of any lines which it may or may not cross. (See the Del Monte case.)

However, this is not the discovery vein, as appears from the testimony of the witness Mayger, the witness Jenney, and the witness Parks. The discovery vein itself determines which are the end lines of the claim, as we have already said, and which are the side lines, and in this case it is shown from the evidence of the witnesses that the end lines are those so declared to be by the locator of the claim by virtue of the location of the claim, its recordation and patenting, all of which are admitted to be prior to the location, recordation and patent of the Nine Hour claim.

The owner of the St. Louis claim is entitled not only to the discovery vein, but to all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward and vertically, and, to quote from the Del Monte case:

> "Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line

of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its tical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the 'right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations," etc.

Now, where is it found in this statute that given a regularly located mining claim with the discovery vein running with the side lines of the claim in its general course, that the right of the owner of such claim is confined to such veins only as in their general course run lengthwise of the claim? Where it is to be found in the statute that his right to veins other than discovery vein

is limited to any particular class of veins, or to any veins running in any particular way in their course or direction? The statute says that he is entitled to all veins, the top or apex of which lies inside of his surface lines extended downward vertically. All veins would include a vein which passes through both end lines and it would also include a vein the top or apex of which is within the vertical side lines, although such a vein might in its course cross the same side line. This doctrine is, as we assert it, laid down in the case of Champion Mining Co. vs. Walrath, where, however, it is extended, so that the right to follow such a vein, even though it be not the discovery vein, is bounded only by planes passed through the end lines of the claim as such end lines are determined by the discovery vein.

It must be quite apparent that irrespective of the deed the right of the defendant in error to follow the vein in question between the planes to which is was limited in the court below is absolute, because it is a vein other than the discovery vein, having its top or apex within the surface boundaries of the St. Louis claim, and the portion in question is well within the end lines of the claim; it is even confined to so much of the vein as has its entire apex within those surface boundaries.

What effect then did the deed have?

In discussing this question we will first discuss the effect of a deed without considering the circumstances concerning the execution of the deed so as to effect

its interpretation. We do not agree with counsel in the assertion that any common law rights attach to a deed to a mining claim. It is a well established rule that a deed by the government carries nothing by implication. By the statute law concerning mining claims all that a locator obtains by locating a mining claim on the public domain is the exclusive right to the surface ground and all veins having their top or apex inside of the surface lines extended downward vertically, and the further right, which is absolutely inconsistent with the idea of a common law grant, to follow such veins on their dip beyond his vertically side lines, which right is limited to perpendicular planes passed through his end lines; he owns no veins apexing outside of the boundary lines of his claim extended vertically downward.

This case must depend entirely upon the construction to be given to the deed, Exhibit "B", page 10, of the Compromise Ground. In construing that deed either with or without the other papers connected with it we must remember:

> "That the language used is to be construed with reference to the peculiar property about which the parties were contracting."
>
> Richmond Mining Co. vs. Eureka Mining Co. 103 U. S. 846.

"The peculiar property" that we were contracting about then is the subject to which we must direct our attention. It was not only a mining property, but it was also a min-

ing property which was "a part of the Nine Hour mining claim." It is contended by the plaintiff in error that the words contained in that deed are capable of two meanings. 1. A meaning which gives a vertical line on the westerly side of the Compromise Ground and another a meaning which gives a line parallel to the vein on the other side of the Compromise Ground. The expression in the deed so often referred to and the part of the general printed clause in such a deed:

> "Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed,"

is capable of more than one meaning. Was it intended to convey by vertical lines as in the case of agricultural lands, or was it intended to convey only such ores as the Nine Hour claim would have been entitled to had there not been a wrong survey across a part of its area, or was it intended to convey that which wholly or in part apexed within said claim? Three or four different meanings may be given to this language, all entirely consistent with its terms. Under all these circumstances it was the duty of the court to place itself in the position of the parties and to receive evidence outside of the deed of the circumstances under which the parties were placed. Of course that evidence must consist in proving the peculiar circum-

stances under which the survey was made, the controversy in the land office between the parties, the contention in court which was the result of the controversy in the land office and the contract made in promise of that controversy and the suit thereon. We think that this was admissible and in proof thereof we call your honor's attention to the following decisions:

In Nash vs. Towne, 5 Wallace 699, it is said:

> "Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances, and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are accordingly entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them and so judge of the meaning of the words and correct application of the language to the things described."

In Canal Co. vs. Hill, 15 Wall. 94, it is said:

> "To ascertain the intent of the parties is the fundamental rule in the construction of agreements. * * * * The state of things and surrounding circumstances in which an agreement is made, will be looked at as a means of throwing light upon its meaning especially for the purpose of ascertaining its true subject matter." See Syllabus.

In Merriam vs. United States, 107 U. S. 437, the syllabus is:

> "In construing contracts, a court may look not only to their terms, but to their subject matter and the surrounding circumstances, and avail itself of the same light which at the time of making them the parties possessed."

In Doe vs. Burt, 1 T. R. 701, where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease expired, and he having quitted the cellar, the defendant took possession of it, contending that it had passed to him by the demise of the yard, the court held that parol evidence of the surrounding circumstances was admissible to show that it did not pass. In this case the court said:

> "The only question is whether the court is absolutely bound by the terms of this lease to put the construction on it, for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject matter. * * * In the present

case, considering the nature of the property, it was proper to let in evidence to show the state and condition of it at the time when the lease was granted. Prima facie indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances. Therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant."

And in Walsh vs. Hill, 38 Cal. 481, the third paragraph of the syllabus is:

"In construing written instruments, the only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as nearly as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

In Bradley vs. The Washington, Etc., Co., 13 Peters 100, the court says:

"We think that the rule of law, which admits extrinsic evidence for the purpose of applying a written contract to its subject matter, justifies its admission, beyond the mere designation of the thing or corpus, if we may so express it, on which the contract operates, and extends so far as to embrace the circumstances which accompany the

transaction; when, without the aid of those circumstances, the written contract could not be applied to its proper subject matter.

Browne on Parol Evidence, Sec. 53.

2 Wharton on Evidence, Vol. 2, Sec. 940.

In the case of Miles against Barrows, 122 Mass. 581, the court said:

> "But if, upon applying a deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed, and to enable the court to ascertain what was the intention of the parties in the words which they have used."

See Reed vs. Insurance Co., 95 U. S. 31, where the learned judge applies the well known language of Taylor:

> "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument." Taylor Evid., Sect. 1082.

In the case of Brawley vs. United States, 96 U. S. 173 the court says:

> "Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

The same rule of interpretation is found in the statute of Montana. In the Civil Code, the rule is stated as follows: Sec. 2207. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together".

Sec. 2212. "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

And again in Section 3137 of the Code of Civil Procedure as follows: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

And this Section is found identically the same as Sec. 632 Code of Civil Procedure in the Compiled Laws of Montana, 1887, which section had been in force since 1875, and remained in force until the adoption of Sec. 2207, 2212, 2213 and 3136 Supra.

When this deed is viewed in the light of the circumstances in which the parties were placed, to-wit: the original controversy between the Nine Hour and the St. Louis, the purpose for which the suit for specific performance was brought, the fact that the owners of the Nine Hour were permitted to recover without any deed of conveyance or assignment from the persons to whom the contract for the Compromise Ground was given, the findings of the court in the specific performance case and the decision of the courts thereon all these together show conclusively that the deed of the little strip known as the Compromise ground conveyed nothing more than just a part of the Nine Hour Claim. That the St. Louis did not deed and therefore reserved all the rights its would have had, had the claim been surveyed originally to and including its present boundaries. That was the intent of the parties. The Nine Hour never paid for or claimed any part of the vein or any vein belonging to the St. Louis Mining claim. All that had its apex within the St. Louis belonged to it and had belonged to it and had never been contracted to be conveyed and by no slight of hand or skill in wording conveyance could be considered to be transferred to the Nine Hour claim.

The record of the specific performance case pages 32 to 44 is filled with statements that this strip was to be considered as a part of the Nine Hour claim and not as an independent purchase or conveyance. At page 33 it alleges that it is the owner of the Nine Hour Claim and at page 34 it alleges:

"That thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing,' etc. and at page 67 paragraph four the plaintiff in that suit claimed that it was not the assignee of said bond but successor by virtue of owning the Nine Hour claim. It there alleges that it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim and as such it made a demand for a deed. At page 68 plaintiff again describes itself as being 'the successor in interest of the said Robinson, Huggins, Sterling, and its other grantors."

And the court said in its findings of fact, second finding, page 41.

"That the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was, at that time and thereafter continued to be a part of the Nine Hour Lode Mining Claim."

And in the fifth finding the court finds, (page 41):

"That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and

> DeCamp, were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same *as a part of the said Nine Hour Lode Mining Claim*,"

not a possession merely, but possession *as part of the Nine Hour Lode Mining Claim.*

And in the eighth finding that the conveyances were intended to convey the entire interest in the Nine Hour Mining Claim:

> "And it was the intention of the parties to the deeds to convey as well their interest in said compromise strip as every other part and parcel of the said Nine Hour Lode Mining Claim."

It is apparent from these findings and from the allegations in the complaint that in truth the plaintiff in that suit was not the assignee of the contract sued upon but had become the grantee of the Nine Hour and to recover, it was necessary to show tht the strip was not to be conveyed as an independent piece of ground, but a part and parcel of the Nine Hour Lode Mining Claim. All these quotations from that record show beyond any doubt or question that it was the intention of the parties to make good and whole the Nine Hour Lode Mining Claim as it existed before the St. Louis had surveyed for its patent, to convey to the grantee everything that would have been the property of the Nine Hour Mining Claim; and nothing else; and not any part or parcel of the rights of

the St. Louis Mining Claim either on the surface or beneath, either on the apex, strike or dip.

What would be the rights of these parties had the owners of the St. Louis owned the whole of the Nine Hour and had conveyed the whole of the Nine Hour? Would it convey any of the St. Louis in doing it? A conveyance of the Nine Hour would only carry the conveyance of the government, and the owners of the Nine Hour would own only the surface and the veins which have their apex therein. A deed from private parties for the Nine Hour would reserve, as the patent from the United States would reserve, the right of all persons, including the grantor, to enter underneath the premises upon a vein having its apex within their own land and extract ore therefrom. Counsel have said in their brief (p. 29) that reservation is necessary and cite instances of the reservation in the patent and then say: "If reservations are necessary to be made on the part of the government it is difficult to understand why the same reservations should not be made in his deed by an individual grantor."

True, but reservations are not necessary to be made by the United States government. The patent for lands of the United States government is construed with reference to the properties conveyed and in obedience to law; and whatever language used conveys simply what the language of the laws conveys, Sec. 2322 viz the surface ground and all veins having their apex therein and that is all that is given by the law of Congress and not more.

Deffeback vs. Hawke, 115 U. S. 392-406.
Davis's Admr. vs. Weibold, 139 U. S. 506.

The case of Richmond Mining Company vs, Eureka Mining Co., 103, U. S. 839, entirely supports our contention. The Potts Chamber involved in that litigation was upon the dip of the vein far outside of all the premises if considered at the time of the original compromise. A deed dividing the premises along the course of the vein was held to carry not only the surface but also the dip of the vein. It was vertical in its application lengthwise of the vein, but on the dip of the vein it was held to carry the whole dip. The circumstances were entirely different from this. To make it applicable here there should have been a controversy as to the length of the apex by these parties and a division along the strike of the apex would have been held to carry the dip also; and as quoted above, the language used with regard to a mining deed is to be construed with regard to the peculiar property about which the paties are contracting.

Neither does the case of Stinchfield vs. Gillis, in the 96th and 107th California, sustain the contention of the plaintiff in error, and moreover the deed in that case was not made under the circumstances which surround the execution of the deed in the case under review, but the Stinchfield case is an authority directly in point to the effect that the surrounding circumstances may be shown. In that case Gillis had been in possession of a large tract of mineral land. He conveyed a part of it by bargain and sale deed, with implied warranty. One vein apexed in the part sold and another vein apexed in the part retained by Gillis. These two veins united on their dip within

the surface boundary lines of the part conveyed. It will appear from the facts stated in the 107th California that the defendant claimed that the land had been located under two locations and that the part retained was the prior location.

> "At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed in any vein whose apex was within the surface lines of his deed; so, if a locator should convey to A the east half of his claim, and afterwards should convey the west half to B, each of his grantees would in the same manner be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principal, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator

of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was and had for many years been held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff in 1886. The position of the proprietor of a mining claim who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, holds the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed."

The portion above cited immediately precedes the portion of the opinion cited by counsel for plaintiff in error, the following is also a quotation from the Stinchfield case and immediately succeeds the portion cited by counsel for plaintiff in error:

"In thus holding, we concede that, when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and law, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect, 'priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection' cannot possibly be applied to the case where A conveys part of his mining claim to B, for in such a case there is no 'prior location.' Therefore, in such a case, the ordinary rules which govern grants of land must of necessity apply; and, if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection.

Whether the plaintiff would have been entitled to follow the West vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that, inasmuch as the gold in

question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff."

This language is quite pertinent to the issues in this case,

> "So, if a locator should convey to 'A' the east half of his claim, and afterwards should convey the west half to 'B' each of his grantees would, in the same manner, be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance."

We respectfully call to the attention of the court that this action refers to only such portion of the vein as is entirely within the ground and not conveyed to plaintiff in error, that is to say, the entire apex of that portion of the vein within which these ore bodies are found is within the boundary lines of the St. Louis claim exclusive of the compromise ground.

And this portion of the language is also quite pertinent:

> "Whether the plaintiff would have been entitled to follow the west vein into the ground retained by Gillis (the west vein apexed in the ground owned by Gillis) and to claim all the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are

questions not involved in this appeal and upon which we do not express any opinion."

As we have seen the portion of the vein containing the ore bodies sued for had no apex within the ground conveyed. But this case does hold that the surrounding circumstances may be shown; and that is the only question involved in the present discussion.

Let us further consider the construction to be given the deed, on account of the use of the words "together with all the mineral therein contained," in the connection in which they are used. Indeed the whole theory of plaintiff in error's claim is that these words so add to the thing conveyed, as to include the minerals in that portion of the vein apexing outside of the Compromise Strip and apexing within the surface boundaries of the Saint Louis claim. In their brief in the Circuit Court of Appeals, counsel say: "There has been a continuous and consistent sequence in these steps from first to last. If language can gain force by repetition and reiteration, it would seem that the phrase 'together with all the minerals therein contained,' had been the prominent *idea* in the minds of the actors in this controversy from its conception."

The phrase never was used by the locators of the Saint Louis and Nine Hour Lode claims but once, and that was in the covenant to restore the Compromise Strip to the Nine Hour Lode claim after the patent to the Saint Louis, and it cannot reasonably be claimed that it has any

greater or less significance than it had at the time and in the connection in which it was used. It is the foundation of the rights of the parties as used in the covenant, and its meaning therein will control the meaning of the findings and judgment as well as the deed, made in pursuance of them.

Counsel for appellants in error, by the frequent use of the phrase, in all subsequent proceedings since the execution of the covenant for a deed, seem to be enchanted into the belief that there is sufficient magic in it to convert a deed executed with direct reference to the Acts of Congress, which alone can make primary dispositions of the public lands, into a deed at common law and thereby invest it with qualities it did not otherwise possess. The court will not assume for a moment that the phrase has more significance in the deed than it has in the covenant for that deed. It sprang from and was based upon the covenant, and its meaning must be interpreted the same in the one as in the other. Hence the gravamen of this contention is solved by the purpose and intention of the parties to the covenant. If the sense in which it is used can be arrived at from the pleadings and instruments themselves, (and that meaning is not changed or affected by the extrinsic evidence of the surroundings under which they were made), then this extrinsic evidence, about which there is so much contention, is of no practical consequence. If the same results are reached without it, the error, if any, is shown to be harmless and is within the meaning of the Code of Civil Procedure of

Montana, announcing the general rule in such cases, which reads: Sec. 778. "The court must, in every stage of an action, disregard any error in the pleadings or findings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

The answer of plaintiff in error, Record p. 7, sets out the fact of the execution of the covenant for the deed and makes the covenant a part of the answer; that a demand was made for a deed "in accordance with the terms and provisions of the bond"; that an action was commenced to compel its specific performance; that a decree for specific performance was duly made and the deed executed in pursuance of it. It is not claimed that there was any reason to enlarge the premises or estate to be conveyed by the covenant, nor is it asserted that it was done or intended to be done by the decree or deed, but on the contrary just what was contemplated by the covenant was accomplished by the judgment and deed. Aside from any extrinsic evidence admissible under the statutes of Montana, for the purposes of arriving at the intention of the parties, this pleading and the exhibits referred to and made a part of it disclose the following facts:

1st—That the predecessors in interest of plaintiff in error claimed the exclusive right of possession and enjoyment of what is known as the Nine Hour Quartz lode mining claim under the laws of the United States, including the Compromise Strip as a part thereof.

2nd—That the predecessor of defendant in error

claimed the exclusive right of possession and enjoyment of the Saint Louis Lode mining claim under the laws of the United States, including the Compromise Strip as a part thereof.

3rd—That the predecessor in interets of defendant in error made application for a natent for said Saint Louis Lode claim, including said Compromise Strip as a part of it, and that the predecessors in interest of plaintiff in error interposed their adverse claim to said application and brought their action accordingly.

4th—That the boundary lines were agreed upon, the action dismissed, and a covenant given by the applicant to the contestant to convey and restore to the contestants the Compromise Strip as a part of the Nine Hour claim, upon recovering a patent to the Saint Louis claim, and that the deed in question has been executed in pursuance of the covenant.

The only title *held* by the parties to the covenant and the title they could acquire by the patent, was just such a title as is authorized and created by the laws of the United States to a quartz claim, as distinguished from a title to land at common law. Both parties are presumed to know the law, and the question is, under such circumstances, does the phrase, "together with all mineral therein contained" apply to the estate and premises held by the respective parties under the laws of the United States, or shall it have the form and effect it would have at common law, and comprise something more?

There is no contention here as to any minerals that are not contained in that part of the vein having its apex outside of the Compromise Strip, and within the boundaries of the Saint Louis claim. Whatever rights may exist as to the mass of made or country rock within vertical planes extended downwards upon the exterior boundary lines of the Saint Louis claim, after it had restored the Compromise Strip to the Nine Hour, or whatever rights the Nine Hour claim had thereto after such restoration, is not involved in this litigation.

It seems too plain for controversy that under the pleadings, aside from any extrinsic evidence, the parties to the covenant were contracting with reference to the statutory rights each held and could acquire to a quartz mining claim, and none other. The metes and bounds were necessary to the description of the Compromise Strip in conveying and restoring it to the Nine Hour Lode claim, and in no manner restrained or enlarged the statutory right to or in it as part of a quartz mining claim. It is manifest that it was the intention to restore the Compromise Strip to the Nine Hour lode claim, so that it should be held intact as a part of it possessing just such rights as it would have had, if no claim had been made to it by the Saint Louis Claim; and no intention is expressed or implied under such circumstances, that either party surrendered any right that is incident to either claim. Under the laws of the United States, the decision of the Supreme Court, and of this Court, the parties possessed, and will be presumed to have contracted, with

reference to the surface and all veins apexing within it, and the right to pursue such veins as to such parts, in their downward course from the apex to the bottom of them, "together with all the mineral therein contained." The phrase "together with the mineral therein contained," refers to the premises and estate possessed and expected under the law, *i. e.*, the surface and veins apexing therein and not belonging to some prior location. As to such veins, the phrase would be implied whether inserted or not. Leave out the phrase, and how would the matter stand. The Saint Louis Company wants to convey and restore to the Nine Hour Lode the Compromise Strip and make them a deed for it. Under the law it would comprise the surface and the veins apexing and not included in a prior location in it from top to bottom, to the extent of such apex. Metes and bounds are absolutely necessary in describing the premises in such case, and neither add to nor diminish the premises or estate to be conveyed. It is for the sole purpose of locating the *surface* and *veins* apexing within it, that a survey is had and metes and bounds established to convey and restore such veins and surface. Now, what is conveyed and restored to the Nine Hour claim? It is the surface and veins described, "together with the minerals therein contained." And so it is; the phrase would be implied in the connection in which it is used, and being expressed, does not in any way affect the premises or estate granted, unless it could indeed be said that the mineral in the vein did not pass with it unless so expressed. But we find under the law that it is the vein of minerals and surface

that would and did pass, whether expressed or not. Confining the phrase to the estate and premises owned by the Nine Hour claim and restored to it, and we find that the phrase is necessarily implied under the law, the decision of the Supreme Court in the Del Monte Mining and Milling Company vs. Last Chance Mining and Milling Company, 171 U. S., 55, and the decision of Circuit Court in this case, and the fact that it is expressed, is of no consequence.

Counsel cite Winter vs. Loveden, 1 Lord Raymond, 267 and Cardigan vs. Armitage, 2 Barn. & Cress., 197, to show that the words, "together with," in connection with a previously mentioned subject in a deed or power, operate to enlarge and not restrain that which was previously granted. No lawyer would claim that the words were restrictive, and the question as to whether they enlarged the previously granted premises would depend entirely upon the connection in which they were used. If used in connection with a conveyance of land under a statute that made the appurtenances pass with the land, a conveyance of the land, "together with" the appurtenances expressed in the deed, neither adds to nor detracts from "what was previously granted." And so it is here; a piece of land is necessarily described by metes and bounds to see how much surface and what veins are included in it, and under the statute to afford the means of conveying them. And it is not contemplated that this description by metes and bounds shall enlarge the estate and premises manifestly intended to be conveyed, so as to include more than

the veins and surface and mineral therein contained. The phrase will be limited to the estate and premises theretofore conveyed and the mineral therein contained as defined by the statute, and not extended so as to give them the effect of a common law title. If a right to follow a vein on its dip is not expressed, it would be implied under the law, so that it would add nothing to the estate or premises conveyed by expressing in the conveyance "together with" the right to follow the vein on its dip. When an estate in fee is granted, adding the words together with the quiet and peaceable possession thereof, does not enlarge or broaden the estate previously granted, and when a right, title and interest or defeasible estate is granted, the addition of the words "together with the quiet and peaceable enjoyment thereof forever" is limited as to the estate conveyed, and is not allowed to attach itself to the land and broaden or enlarge the grant. Here the parties contracted with reference to the surface of the claim and veins apexing therein and not belonging to a prior location, and it is sought on account of the description necessarily employed to grant them, to enlarge the grant by not limiting it to the surface and veins, and allowing the phrase 'together with the minerals therein contained' to broaden and enlarge the thing granted, *i. e.*, to convert what is comprised in a statutory grant into one contemplated at common law. With as much reason could they expect defendants in error to protect the ground beneath the surface and defend it against a stranger who was pursuing his vein, as he had a right

to under the Nine Hour claim, as that is just what their theory leads to. If the granted premises includes a common law right, the covenant of warranty is co-extensive with it.

It is contended that "allegations of fact by the pleadings repugnant to the correct construction of the contract may be disregarded," and numerous authorities are cited to support the proposition. No one doubts that a pleader could not come into court and construe the contract in his favor and bind the court by the construction he placed upon it. But if it involved a question of intent, and the pleading conceded that the construction given to it by his adversary in the action was as he understood, it might be a question how far the court would allow him to gainsay it when he found it to his advantage to do so. This is presented, we presume, to relieve plaintiff in error from the construction it has made of the judgment and deed, and avail itself of any benefit it might have if this construction had not been made. They seem to concede that the judgment and deed is broader than the covenant upon which they are based, by arguing its effect as *res judicata*. While plaintiff in error seems willing to take the advantage of these conditions, if they really existed, the court would never so construe them, when it was at all *possible* to reconcile them with the covenant upon which they depended. Indeed the court would at once recur to the pleadings and see if there was any fraud or mistake alleged or issue presented to justify a re-formation of the covenant, and if not, the judgment to that extent would

be void. Really the sum and substance of the contention is, that even if the covenant and pleadings limited the rights of plaintiff in error to the Compromise Strip as a part of the Nine Hour Lode claim, and did not carry with it that part of the vein having its apex outside of it and inside of the Saint Louis claim, that some phraseology in the judgment gave it to them, and that the court will not go outside of the judgment and deed to ascertain what was really litigated so as to give the judgment and deed the proper construction. No better elucidation of this question can be had than the facts and circumstances of this case present. Under the law and decisions a quartz claim comprises the surface, and all lodes apexing within the surface (not belonging to a prior location) to their full dip, even though they dip under and beneath the claim of another, a deed has been made to reconvey the naked legel title by patent to the Saint Louis claim back to the Nine Hour as a part thereof, and by this judgment and deed it is claimed that the words "together with all the minerals therein contained" do not refer to, and are limited by, the surface conveyed, and apexing within it, but that a description of the surface by metes and bounds, made for the sole purpose of description, and which could be made in no other way, changes the meaning of the words "together with all the minerals therein contained," and makes them apply to said piece of land as if it were agricultural and not mineral. Now, it is claimed that the court will not look to the pleadings to ascertain whether these words, from the substance of the issue, shall be in-

terpreted as they should be in the conveyance of a quartz mining claim, or as they would be in the conveyance of a tract of land other than a mining claim. The covenant made a part of the pleadings, shows that it was to be conveyed and restored to the Nine Hour as a part of it, and further shows that the phrase "together with all minerals therein contained" did not include the part of the vein not belonging to the premises so restored. But above all the pleadings and covenant made a part of them, show that the strip was always a part of the Nine Hour lode, and that defendant in error and its predecessors in interest only held the naked legal title as trustees, and it is now claimed that by the deed and decree it was compelled to convey and restore not only the trust property, but some of its own, and that the court cannot resort to the pleadings to ascertain if this is true, and if so, whether the jurisdictional averments exist to warrant it. Recourse may be had to these for the purpose of ascertaining the object in describing the part of the claim by metes and bounds, and for the purpose of shewing that the subject matter of the litigation was to restore this title in the *trustee* to the *cestui qui trust* and to characterize the piece of land so conveyed. If the phrase referred to it as a part of a quartz claim, it leads to absurdities to say that by the survey and description by metes and bounds it lost, or was intended to lose its idiosyncrasies, so to speak, as a quartz mining claim, and there was imported into it thereby some element that took property never held in trust, and gave it to one who was

not a beneficiary in it. Under such circumstances the court will resort to the pleadings and findings upon which the deed is based to ascertain what was litigated, and apply the judgment to the subject matter upon which the adjudiciation was had. It is the duty of this court to determine whether the subject matter included in the judgment was a quartz mining claim or a piece of land *aliunde* such claim. This is not shown by the judgment alone, and it would be of no consequence if the estates were identical. But when the estate in the one instance carries with it only the surface, and excepts therefrom all veins apexing outside of it, although dipping beneath it, and in the other no extralateral rights exist, and the grantee takes all beneath the surface, the character of the property disposed of becomes of the utmost importance in applying both judgment and deed to their proper subject matter. In this way the *judgment* and *deed*, being silent as to this matter, are not changed or contradicted. By the pleadings of plaintiff in error the covenant and findings of the court, the subject matter adjudicated, and the application of the phrase "together with all the minerals therein contained," are limited and controlled by the character of the property involved. If it refers to a quartz lode it means one thing, and if a homestead entry, another. By the pleadings and findings it is demonstrated that the strip always was a part of the Nine Hour, and that under the covenant defendant held the bare legal title in trust, and that the intention was to convey and restore it to the beneficiary of the trust, and not to convey

any right or interest of the trustee in his own individual property.

Barnes vs. Chicago, Milwaukee, &c., 122 U. S. 1.
The American Co. vs. Bradford et al., 27 Cal., 360, 368.
Clay vs. Hildebrand, 34 Kan. 694.
Freeman on Judgments, Sec. 45.
Lewis vs. Smith, 9 N. Y. 502.

A suit to recover dower: defendants pleaded a decree foreclosing a mortgage executed by the husband of plaintiff. Plaintiff had not executed the mortgage, but the decree of foreclosure was against the plaintiff also. Held that the pleadings in the foreclosure suit could be resorted to, in order to determine the effect of the decree as against her.

Under the foregoing decisions, by reference to paragraphs 2 and 3 of the complaint, in the action in the state court wherein the deed was ordered to be executed, Record pp. 33 and 34 inclusive, it will be found that it was only the trust property that was in litigation, that that property was and always had been a part of the Nine Hour Lode claim, and that there is no allegation in the pleadings or findings in that case upon which to predicate a judgment for anything else.

Authorities are also cited to show that in some States, Missouri among others, the judgment operates *ipso facto* under the circumstances of this case, to convey the property, and that no deed was necessary. If this be true,

the findings referred to in it sustain the interpretation given to it by the court, and full faith and credit has consequently been accorded to it under the constitution and laws. If it was not restored to the Nine Hour as a part of a quartz claim, the phrase "and all minerals therein contained" might be of some significance, but as it is, it simply expresses what would otherwise be implied.

Counsel also insist that if the conveyance was to a stranger there would be no uncertainty in the deed so as to require the surrounding facts to aid in its interpretation. The conveyance of a town lot or piece of land by legal subdivisions might so characterize it as to preclude the idea that it was conveyed as a mining claim. So, also, the conveyance of a quartz mining claim might preclude the idea that it was conveyed as a town lot. Yet if the deed is silent, the character of the land conveyed and purposes of the conveyance would have much to do with the interpretation to be given the conveyance. If A owned a quartz claim adjoining B, and should sell it to C, "together with all the minerals therein contained," no reasonable claim could be asserted by C to the mineral contained in a vein apexing in B's claim because in its dip it passed beneath the claim conveyed to C. If we assume that A was the owner of two adjacent quartz claims and sold one to C "together with all the minerals therein contained," C would be in no better position to assert a claim to minerals apexing in A's remaining claim than he would if B had been the owner of it. How much more, then, would this be so if A held an adjoining claim

in trust for B, and simply conveyed and restored to him the legal title. The suggestion of the court below is that it would require language that would admit of no other construction to allow it to work out such results and deprive the adjacent owner of his extralateral right. Certainly describing the surface by metes and bounds would not do this. It would not change its identity as a quartz mining claim or part of one, and the mineral therein contained would unquestionably be limited to veins apexing within its boundary lines.

Applying these principles to the mining law, which is a conditional grant as well as a law, the term lands would be limited to the surface and veins, lodes and ledges upon said lands, and the veins, lodes or ledges are "the lands" referred to in which mineral deposits are found, and the *surface* is the *land* for which five dollars per acre is to be paid for the convenient working of the veins, lodes or ledges. And this likewise defines and limits a mining *claim or location*. The rights about which we are speaking are not reserved rights. The question simply is, what rights are conveyed by the grant, and the grantee is not in a situation under such grant to say "hands off" of anything except the granted premises and whatever else is indispensable for its enjoyment.

We have referred to the matter of title under the patent to the strip which defendant undertook to procure and deed back to plaintiffs in error, in order to show that no such title to all beneath the surface, as claimed by coun-

sel, could have been contemplated by the covenant, findings and judgment, and that the deed would be construed accordingly.

And so it is, both parties to the covenant expected the Saint Louis Company to get, by the patent, a title to the surface and the veins apexing therein, and nothing else. They contracted with reference to the title to be acquired by the patent, are charged with a knowledge of the law governing the estate to be granted by it, and must, consequently, have known that the phrase "together with all minerals therein" of necessity referred to minerals belonging to the surface conveyed. They could not, and did not expect the Saint Louis Company to get a title to the strip that would extend to the center of the earth and include everything beneath the surface within vertical planes extended downward upon the exterior boundary lines of the strip. They were charged with the knowledge of the exact title to be conveyed by the patent, and it was that self same surface which was to be restored to the Nine Hour, and none other. The words, therefore, "together with all the mineral therein contained" do not in any way enlarge the estate granted, but refer to and are limited by it.

The conclusion is that there is no covenant, pleadings or judgment to support the deed for anything but the trust property acquired by the patent, and that it must be limited in its operation accordingly. The trust is discharged by the execution of the deed and the strip is restored to the Nine Hour claim, of which it was always a

part, and has the precise status it would have had if the trust had never been created and had never been patented as part of the Saint Louis lode.

We recur again to the interpretation of the judgment by the pleadings and the covenant made a part of them, and the findings. If it is to be interpreted by these, not the slightest doubt can exist as to the intention of the court, and the Saint Louis Mining and Milling Company intended to do just what the court intended it should do in executing the deed. It was made by force of the judgment and to carry out the judgment; hence the purpose and object of the judgment must prevail, and it is the controlling element in the case. In Fowler vs. Doyle, 16 Iowa, 534, on pages 535 and 536, Dillon, J., speaking for the Court, says:

"It is proper in all cases, and in cases where the entry "is obscure, or not clear, it is necessary to read the record "entry in the light of the pleadings and of the entire "record. See, generally, on this subject, 1 Greenlief Ev., "Secs. 511, 514; Foot vs. Glover, 4 Blackf., 313; Bell vs. "Mossey, 14 La. Ann., 831; Hughes vs. Blake, 1 Mason, "514.

"Looking at the record entry alone, we would conclude "that it contained no judgment against Mary Ann Doyle. "If, then, upon the testimony which was before the Court, "it was clear that Michael Doyle had, in law, no interest "in the note, at the time the defendant was garnished, "it would follow that the latter could not be held as the "debtor of Michael."

So here by examining the pleadings, covenant and findings, it will clearly appear that the judgment was intended to cover and *could only cover* the trust property, *i. e.*, the strip of the Nine Hour claim, being all that was involved in the litigation.

To the same effect is Finnigan vs. Manchester, 14 Iowa, 521, 522; Beers vs. Shannon, 73 N. Y., 292, 296; Foot vs. Glover, 4 Blackf., 313. In Clay vs. Hilderbrand, 9 Pac., 466, 34 Kan. 694, the Court (p. 470) says:

"We think, however, that the judgment is open to an-
"other and a fairer interpretation, and one which will
"render it correct and proper; and wherever a judgment
"is open to two or more interpretations, that interpreta-
"tion should be given to it which will make it correct
"and proper, and which will make it correspond with
"the pleadings and the other proceedings in the case, and
"not an interpretation which will render it improper or
"erroneous."

The deed is based upon the judgment, and not the voluntary act of the grantor, and it will be assumed that the court construed it to conform to the judgment, and not that the pleadings, findings and judgment are controlled by the deed as claimed by counsel for plaintiff in error. It was never intended that the deed should broaden the effect given to the judgment by the covenant pleaded, the pleadings and finding, so as to include property rights not litigated. It will, therefore, be presumed that the court construed the deed to conform to these, and this Court will interpret it accordingly.

Herman on Estoppel, Vol. I, page 232, uses this language:

"It makes no difference whether the judgment is on a "question of law or fact, for whenever the construction of "an instrument has been judicially determined, it must "be followed in every other action where the same issue "arises between the same parties and those in privity "with them in law or estate."

Herman cites many authorities in support of his proposition, and counsel for plaintiff in error cites authorities to the same effect.

Defendant in error claims that the court construed the deed to conform to the pleadings, covenant, findings and judgment, while the contention of plaintiff in error is that the deed must speak for itself, and that the court intended the pleadings, covenant, findings and judgment from which it sprang, and upon which it depends for its very existence, to be controlled by it. The deed is a part of the court proceedings, and all the proceedings must be taken together in construing it.

The deed does not operate as the independent act of the parties. It was made under compulsion, and cannot be made the means of shutting out the antecedent proceedings, without which it would be as impossible for it to exist, as for the plant to flourish without the continued support of the soil from whence it sprang.

In Barnes vs. Chicago, M. & St. P. R. R. Co., 122 U. S., page 1, the court (p. 14) says:

"Every decree in a suit in equity must be considered "in connection with the pleadings, and, if its language "is broader than is required, it will be limited by con- "struction so that its effect shall be such, and such only, "as is needed for the purposes of the case that has been "made and the issues that have been decided. Graham "vs. Railroad Co., 3 Wall. 704."

This case is directly in point, and shows that the judgment cannot broaden the issues so as to include anything but the trust property, and that it will not be construed to include veins belonging to the trustee, *i. e.*, individually, and not to the *cestui qui trust*. The pleadings, covenant, findings and judgment clearly show that the defendant in error was to obtain the patent title in trust for plaintiff in error, for which reason the deed should not be construed to broaden the estate thus acquired, being a part of the proceedings in the enforcement of the trust, and referred to in the judgment. Defendant in error was sued as a trustee of the patent title and the subject of the action was the trust property, and the deed will be construed to include nothing else.

Brown, et al., v. Cranberry Iron & Coal Co., 59 Fed. 434.

In Merriam v. United States, 107 U. S., 437, the Court (page 441) uses this language:

"It is a fundamental rule that in the construction of contracts the courts may look not only to the language

employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.

> "Nash v. Towne, 5 Wall., 689; Barreda vs. Silsbee, 21 How., 146-161; Shore v. Wilson, 9 Cl. & Fin., 355-555; McDonald vs. Longbottom, 1 El. & El., 977; Munford v. Gething, 29 L. J. C. P., 110; Carr v. Montefiore, 5 B. & S., 407; Brawley v. United States, 96 U. S., 168."

The deed is the result of a *series of events* detailed in the records of the court, and it will, under these authorities, be interpreted by them. The construction of a deed comes within the rule applicable to the construction of contracts.

> Reed v. Ins. Co., 95 U. S. 31.
> Miles v. Barrow, 122 Mass. 581.

The law in force at the time, Section 632, First Division, Compiled Statutes of Montana, reads:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

For an interpretation of this section, a very able and forcible opinion of Blake, J., in

> Shreve v. Copper Bell M. Co., 11 Mont., at p. 323.

Acts of the parties under a deed or contract are always admissible in interpreting them and in showing the understanding of the actor. In this case, as shown by the record, plaintiff in error did not stop within the vertical planes extended downward upon the lines of the strip, but continued to extract the ore after the vein apexing within the Saint Louis claim had passed beyond those lines. By this it shows that it did not regard the deed, as it is termed, a common law deed, otherwise after blocking out the ore within the perpendicular planes through the lines of the compromise ground they would have left the balance in the vein for the defendant in error beyond those planes.

This deed cannot be considered as evidence of the intention of the grantor. It is the product of judicial proceedings and its purpose and operation must be limited and controlled by these. These proceedings show that its subject matter was a quartz claim, and that the property to be acquired and held by the patent, was to be held in trust, and that the whole purpose of the deed was to discharge the trust by the conveyance of the title acquired by the patent, and nothing else and no more.

The decision of the Supreme Court of the United States in Del Monte Mining & Milling Company v. Last Chance Mining & Milling Company, and the Circuit Court of Appeals in this case emphatically determine the title and estate defendant in error acquired under the patent, and the rights plaintiff in error has in the strip as a part of the Nine Hour Lode

Claim, and the deed should not be construed to include any other title or estate or convey or restore anything but the trust property acquired under the patent.

That the Court may more readily get at the facts showing that this contention is brought directly within the principles announced in the foregoing decisions, and the decisions of this Court, and that the purpose of the entire proceedings from the filing of the complaint in the action in which the State Court ordered the execution of the deed, up to and including the deed, was to enforce the trust on account of obtaining the legal title to the compromise strip by the patent issued therefor, which always was a part of the Nine Hour Lode Claim, and that the deed in its operation is in discharge of the trust and will be so construed, we quote from the complaint in the suit for specific performance, the covenant made a part of it, the findings of the court and judgment, such portions as bear upon the issues involved.

FROM COMPLAINT.

(Paragraph II, p. 33, et seq.)

"And the plaintiff further shows and alleges that on and prior to the seventh day of March, A. D. 1884, plaintiff's predecessors in interest, to-wit: one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral land claimants, were the owners of, in possession of, and

lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode Mining Claim situate, lying and being in Ottawa (unorganized) Mining District, in the County of Lewis and Clarke, and State of Montana, more particularly described as follows, to-wit: * * * * together with all the mineral therein contained, * * * which said premises were then, and ever since the 26th day of July, 1880, have been a part of the Nine Hour Lode Mining Claim, so the property of the aforesaid predecessors in interest of this plaintiff and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession, and entitled to the possession thereof. * * * And for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and the said Saint Louis Mining Claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly

mentioned and described, a copy of which said bond for a deed is hereunto annexed, marked "Exhibit A," and hereby made a part of this complaint."

(From Paragraph III, p. 34.)

"That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode Mining Claim."

(Paragraph IV, p. 34.)

"And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim."

(Paragraph V, p. 35.)

"And plaintiff further shows and states that not only has the defendant, Charles Mayger, refused and declined to comply with the request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by said bond for a deed he covenanted and agreed to do, but on or about the 10th of June, A. D. 1893, for an alleged consideration of one

thousand dollars, he made, executed and delivered of and for said premises to the said defendant, the St. Louis Mining & Milling Company, of Montana, but plaintiff avers that at the date of the execution of the said deed the said defendant, the St. Louis Mining & Milling Company, of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said co-defendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors."

(Record, p. 35.)

"Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs."

FROM COVENANT EXHIBIT "A."

(From Record, p. 36, et seq.)

"The consideration of this obligation is such that, whereas, a certain cause now depending in the District Court of the Third Judicial district, Lewis and Clarke county, Montana, between William Robinson and James

Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States Land office at Helena, Montana.

"Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agree to proceed at once upon his application now pending in the United States Land Office at Helena, Montana, for a patent to the Saint Louis claim, described therein, and situated in Lewis and Clarke County, Montana Territory, and procure as soon as practicable a government patent therefor, and when such title shall have been procured according to such application, the said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis and Clarke County, Montana Territory, and comprising a part of two certain quartz lode mining claims known as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to-wit: * * * * together with all the mineral there-

in contained; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect."

FROM FINDINGS.

(Record, p. 41. Finding II.

"That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode Claim, situate, lying and being in the Ottawa (unorganized) mining district in the county of Lewis and Clarke, state of Montana, and that the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode Mining claim."

(Finding III, Record, p. 41.)

"That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States Land Office at Helena, Montana, for a patent to the said Saint Louis Lode Mining Claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an

action had been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the District Court of the Third Judicial District of Montana, within and for the County of Lewis and Clarke; that on the seventh day of March, A. D. 1884, the said Robinson, Huggins and Sterling, and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid."

(Finding V, Record, p. 41.)

"That at the date of the execution of said bond the said Robinson, Huggins and Sterling, Eddy and DeCamp, were in the actual possession of the said compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode Mining claim."

(Finding VI, Record, p. 41, 42.)

"That at the date of the execution and delivery of said bond it was expressly agreed between the parties thereto

that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode Mining Claim."

FROM CONCLUSIONS OF LAW.

(I, Record, p. 43.)

"The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the 'compromise ground.'"

FROM JUDGMENT (Record, p. 43.)

"And after due deliberation, the court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the *equitable and* entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

"Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant, the St. Louis Mining & Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to said plaintiff a good and sufficient conveyance in fee simple absolute, free from all encumbrances, of and for the

premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name and for and on behalf of said defendant, the St. Louis Mining & Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one heretofore attached and approved, and, upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis and Clarke and State of Montana, the same shall have the force and effect of a conveyance of the said title from said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any part thereof.

"The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to-wit: * * * * together with all the mineral therein contained."

FROM THE DEED

Which is "Exhibit A" annexed to the Answer, (Record p. 10.)

"That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to its assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis and Clarke and State of Montana, more particularly bounded and described as follows, to-wit: (Here follows a description of the same as contained in the covenant and judgment.) Together with all the mineral therein contained. Together with all the dips, spurs, angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with appurtenances.

"To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever."

It is axiomatic that the deed conveys the strip as a part of the Nine Hour Lode, and does not deprive the St. Louis Lode of any of its extralateral rights, and that the phrase "together with all the minerals therein contained" refers only to such minerals as it is entitled to as a part of the Nine Hour Claim, and that defendant in error intended by the deed just what the court intended it to be, as shown by the proceedings in the case; and that the deed, being silent as to this matter, is fully interpreted and explained by said proceedings upon which it is based.

To cite authorities to the effect that defendant in error could only be required to transfer the naked legal title acquired in trust through the patent, and that by so doing the legal and equitable title is merged in the *cestui qui trust* and the trust discharged, would be useless and unnecessary. The record shows that this has been done, and that the effort of plaintiff in error to acquire a part of the individual interest of the trustees in the St. Louis claim is in a measure reprehensible.

We respectfully submit that there is no repugnancy in the complaint, and that it properly construes the deed in accordance with the authorities cited.

The effect of this deed is raised in only three assignments of error, to wit, 10, 11 and 12.

The objection to the introduction of the exhibits mentioned in Assignments of Error 10, 11 and 12 on the ground that they were not in rebuttal is not well taken; first, because the plaintiff in error objected to their being introduced upon the opening of the case for the reason that if they were proper evidence at all they should be introduced in rebuttal, and further for the reason that it was within the discretion of the court to allow us to introduce them at any time. And further, the assignment is not well taken because the papers were admissible in evidence to show the surrounding circumstances as appears in the case of Stinchfield against Gillis and other authorities already cited in this brief.

Assignments 11 and 12 cannot prevail. These instructions would include blocks of ore some of which are between the planes mentioned in the complaint and not within the terms of the deed however broad the interpretation of that paper may be made. An inspection of the map (plaintiff's ex. 1) will show one block of ore so taken to have been entirely north of the 30 foot strip, another entirely east of the 30 foot strip and another entirely west of the 30 foot strip and entirely within the surface boundaries of the St. Louis ground exclusive of that strip.

And, moreover, our contention is that the deed when interpreted in the light of the surrounding circumstances, cannot be construed to convey any right to the plaintiff in error which its predecessor in interest did not have by virtue of the location of the Nine Hour; that location

was subsequent to that of the St. Louis and could not include any portion of the vein in controversy.

IV.

POSSESSION.

The defendant, the plaintiff in error, contends that the possession of the apex is not sufficient possession to maintain trespass, but is a mere constructive possession. The statutes of the United States would seem to determine that whoever had possession of the apex had actual possession of the whole of the vein therein. There is nothing discriminating as to constructive possession as contrary to actual possession. The difference between mining property and agricultural property is only in the direction of the descent into the earth. One descends vertically the other follows the vein—the actual occupancy may be only on the surface but the possession below the surface is in each case actual not constructive.

An expression in Iron Silver Mining Co. vs. Cheesman, 116 U. S. 533, would seem to sustain our contention:

> "It is obvious that the vein, lode or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and his right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location."

The case cited by counsel himself holds to the contrary of his contention; in Pardee vs. Murray, 4 Montana 234-277, the court says as follows:

"The possession of the respondent was sufficient to maintain this action. He had possession of the surface ground, and such possession gave him possession of all veins, lodes and ledges through their entire depth, the tops or apexes of which lie inside of the surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of the surface location. U. S. R. S. Sec. 2320.

"Possession of the surface of a mining claim location is possession of all veins, lodes and ledges, the tops or apexes of which are inside the surface lines, altthough such veins, lodes and ledges, as they go downward, may extend outside such surfact lines; and possession of the surface ground protects such veins, lodes and ledges from the operation of the statute of limitation."

"The possession of a vein recognized by the mining laws, and to which protection is given, is by one who holds the surface where the vein makes its apex."

Eilers vs. Boatman, 3 Utah, 167. Affirmed 111 U. S. 356.

It may be that, in the absence of proof as to where the apex is, the presumption is that he who owns the surface owns all that is below; but when the vein—the apex—is shown to be in the mining claim of "A", then he is presumed to be in possession of so much of the dip of the vein as lies between perpendicular planes passed through his end lines.

The claim of the plaintiff in error that the court in the decree for specific performance declared that the defendant was in possession is unfounded in fact. The court was finding as to the possession of the Nine Hour Claim and because of such possession that the plaintiff therein was the successor of the grantees in the bond and the court found that they were in possession "as a part of the Nine Hour Lode." Counsel in his quotation omits the quoted line, which gives all the point there was to the finding.

The case of Hugunin vs. McCunniff, 14 Morrison, Min. Rep. 463 does not hold, as contended, that the possession of the apex is a mere constructive possession only, but it did hold in that case that one of the parties had a constructive possession, only because he did not take possession under his deed given to him by the opposite party and that the mere reception of the deed unaccompanied by any actual occupancy was mere constructive possession. The constant practice in these mining claims is for the owner of the apex to maintain the trespass. Thousands of cases could be found where such action has been maintained. While mere absence of holding or of any

question raised is not perhaps conclusive, it certainly should have much weight in cases like this. The constant practice of maintaining trespass for veins in which the possession is that of surface possession of the apex has practically settled the law in favor of such right. This question is settled by the pleadings.

In paragraph 2 of the complaint (record p. 1) the plaintiff alleges that he is the owner of, entitled to and in the actual possession and occupation of * * * "any and all veins * * * through their entire depth the top or apexes of which lie within the surface lines," end of quotation: paragraph 1 of the answer (record p. 7) "admits the allegations contained in paragraphs numbered 1, 2 and 3 of the * * * * complaint."

V.

MITIGATION OF DAMAGES.

In the 13th assignment of error the plaintiff in error claims that the damages should be mitigated in some manner, upon the hypothesis of the supposed facts therein stated. The facts assumed in the request were unfounded and there was no evidence whatever tending to prove them. The instruction was therefore rightly refused for that reason. The assumption of the facts in the request is that the ore was mined and preserved and that the defendant, plaintiff in error, has the ore now ready to be delivered to plaintiff in good condition. The ore in those blocks was not preserved by itself. The testimony of the plaintiff tended to shown how much there was in each

block. The testimony of the defendant showed that a part of it, forty or fifty tons had been milled, that is used by the defendant and sold (Record page 30); that another portion of it had been dumped down into that part of the mine to which the plaintiff had no access. That any was stored ready to be delivered was not proven, and no definite statement of the amount of tonnage was given of any ore preserved so that there was nothing upon which the court could charge such a request. It would have been misleading under the circumstances of the case. But in addition to that objection the law is incorrectly stated. A mere fact of preserving ore would not justify the deduction of the price thereof from the recovery for damages. We bring an action of trespass for injury to the land to the extent of the value of the ore. Nothing would mitigate the damages except a return and acceptance of the ore itself. Here there was no return, no acceptance, no tender of any return. There is nothing in the transaction to mitigate the damages in the least.

3 Sutherland on Damages, 481-482.

VI.

The defendant complains in the 8th assignment of error that the plaintiff was allowed to prove that the defendant ran the 400 foot level through the vein or along the vein. There seems to be no claim in the brief however, of any injury therefrom; certainly no damages were allowed for it. None were claimed and none were allowed in the charge, and for aught that appears, the jury

were informed that no damages could be recovered for it. It was competent, however, for us to show that they were entering upon our property. The vein was the property of the plaintiff, and any trespass upon it, whether with or without injury, entitled the plaintiff to nominal damages.

VII.

The last assignment of error upon which the plaintiff in error bases any argument is the instruction given by the Court, as follows:

> "The evidence in the case shows that the discovery vein of the St. Louis claim extends substantially from one end line to the other lengthwise of the claim; that it dips to the east, and there is another vein having a section of its apex wholly within the St. Louis claim, between the planes known as the 520 and 108."

The witnesses Parks and Jenney had so testified, and there was absolutely no evidence to the contrary. That was one of the facts involved in the issues in the case; there being no dispute as to this fact, it was proper for the Court to instruct the jury to that effect.

In the United States Circuit Court the Judge has power to instruct the jury not only that one fact has been, but that all facts have been proved, and this as well for the plaintiff as for the defendant. The Court at the close of the testimony where the undisputed evidence establishes facts not sufficient to constitute a cause of action,

may so charge the jury and direct it to bring in a verdict for the defendant.

And, equally, where the undisputed evidence establishes facts constituting a cause of action in favor of plaintiff, and no evidence is given tending to prove a defense thereto, the court may so charge the jury; charge the jury not only as to one issue, but direct it to bring in a verdict for plaintiff.

North Penn. R. R. Co. vs. Commercial Bank, 173 U. S. 727.

Deleware, etc., R. R. Co. vs. Converse 139 U. S. 85.

In the case of Pucker vs. Wheeler, 127 U. S. 85 cited by counsel, the court, speaking of an instruction which left it for the jury to say whether or not there was any evidence upon one of the issues, used this language on page 44:

> "Indeed, we are not sure but the court might properly have given a peremptory instruction in favor of the defendant upon this branch of the case."

VIII.

No argument was made in the Circuit Court of Appeals by counsel in their brief under the assignment of error XV; so we presume that the point is abandoned. However, there was no error in refusing to charge the jury as requested by plaintiff in error in the instruction which forms the ground of that assignment. It absolutely took away from the jury the question as to whether

or not the trespass was willful, and there was evidence sufficient to justify the jury to find that the trespass was willful, and in such a case, the jury, in estimating the damages sustained, would not be confined to the value of the ore as it stood in the mine.

Wooden-Ware Co. vs. U. S. 106 U. S. 432.

Lindley on Mines, Vol. 2, 1129 et seq. and authorities cited.

St. Clair vs. Cash Gold M. & M. Co., 47 Pac. 466.

Cheesman vs. Shreve, 40 Fed. 787.

IX.

No argument was made by counsel for plaintiff in error in the Circuit Court of Appeals under assignment of error No. XVII.—That was an instruction given by the court; and the law as therein stated is correct.

The Antoine Co. vs. The Ridge Co., 23 Cal. 219 and authorities last above cited.

Counsel for defendant have raised in their brief in this Court a new objection to instruction No. 1: see their brief p. 61. They draw a distinction between the words "portion" of a vein, and the word "section" of a vein.

While it is true that the complaint does allege "That the dip of one of the veins having a portion of its top or apex inside," etc.—it is equally true that the complaint shows, as to that portion of the vein involved in case No. 213, that it has its entire apex within the St. Louis claim: the description of this vein shows that at the 520 foot plane the whole vein (foot wall and hanging

wall) is within our surface, and that the vein there travels in a southerly direction within that surface until the hanging wall crosses the side line at the 108 foot plane; and the instruction was limited to these two planes. So it will be seen that the instruction was properly given—1st, because it was alleged in the complaint; 2nd, because it was proved by the evidence and no evidence was given to the contrary, that the vein did have a section of its apex wholly within the St. Louis Claim.

CASE NO. 214.

FACTS.

The facts in this branch of the case are exactly the same as those in 213; except that in the trial Court the decision was against the St. Louis Company and the writ of error was taken by that company, the case was argued in the Circuit Court of Appeals, and our exceptions were sustained. Consequently none of the exceptions relied upon by the plaintiff in error are involved—although the effect of the compromise deed is more or less involved.

The plaintiff (defendant in error) offered at the trial to prove the amount of ore taken by the defendant from that portion of the vein which has its apex between the 108 foot plane and the 133 foot plane on its dip—the offer was made first, as to ore taken by the defendant from that portion of the dip of the vein between these planes and easterly of the west side line of the Compromise Ground or Thirty Foot Strip (see page 19, and Assignments of Error 1 and 4, Record pages 42 and 43, Record in

case No. 214); and second, an offer was separately made to prove the amount of ore taken from the vein on its dip between the same planes, but entirely to the east of the Compromise Ground, that is to say, underneath the surface of the Nine Hour Claim exclusive of the Thirty Foot Strip; the offer referred particularly to a block of ore known as Block No. 3, which was taken out of the vein between the planes mentioned and east of the Compromise Ground (see page 21 of Record in case No. 214, and Assignment of Error No. II, Record page 42 of Record in case No. 214.)

In each instance the Court refused to admit the testimony; and these rulings were reversed by the Circuit Court of Appeals and the cause was "remanded for a new trial as to the damages alleged and recovery sought for conversion of ore between the planes indicated". See Record, p. 54.

In the plaintiff's case in chief, plaintiff offered to show the circumstances surrounding the execution of the deed above referred to; to this evidence the defendant objected upon the ground that "if that is evidence anywhere it is evidence in rebuttal and not on the direct case", which objection was sustained by the Court (all of which appears on page 17 in Record in case No. 214); and for the same purpose plaintiff offered in evidence the judgment roll in the suit for specific performance, which was objected to upon the same ground, with the same ruling (p. 18). On the rebuttal the evidence was admitted. In this connection it must be remembered that the answer set

out the agreement to convey, the suit to compel specific performance and the decree in that suit, and it also alleges that the deed was given (see pp. 7 and 8); and it must be also remembered that the replication admits the execution of the said agreement, the judgment and deed, but alleges the facts surrounding the execution of the agreement, and also alleges the findings and judgment of the Court in the suit for specific performance (see pages 12 to 14), which facts, findings and judgment are hereinabove set out. The stipulation referred to in the offer is that mentioned on page 39 and which in effect waives any objection to the papers offered which might be based upon the ground that the papers were not certified or authenticated as required by law.

It will also appear from the evidence of the witness Keerl that the lines designated as the 520, the 108 and the 133 foot parallel end lines are lines which are drawn parallel to the end lines of the St. Louis claim and within the surface ground of the St. Louis Claim. (See pp. 17 and 18 and Map in our motion to dismiss the appeal.

There are three questions and only three, that are of any great importance; and they are as follows:

1st. What effect is to be given to the Deed to the Compromise Ground, or Thirty Foot Strip, under all the circumstances surrounding the execution and delivery of the deed?

2nd. Given a mining claim so located that its "located" or "discovery" vein (the vein upon which the loca-

tion was made) travels in its course lengthwise with the claim—actually crosses both end lines, and lies parallel with the side lines, of the claim:—when an extra vein, or a by-vein,—a vein other than the discovery vein also lies within such claim, entering at the northerly part of one side line, thence traveling in a southerly direction, almost parallel with that side line and wholly within the surface ground of the claim until the hanging wall departs therefrom at a point at least 710 feet from the point at which it enters, the foot wall being wholly within said claim for a much greater distance,—under these facts, which claim owns that portion of the vein the apex of which, at the points of departure at the southerly end, is partly within the senior location and partly within the junior location—what planes determine the extralateral rights of the senior location in and to the "by-vein" or "extra vein"?

3rd. The judgment of the Circuit Court of Appeals not being final, this appeal should be dismissed.

In considering this subject, we must determine what are the rights of the St. Louis Company, irrespective of the compromise deed to the thirty foot strip, and as through the St. Louis Claim as patented did not include the Compromise Ground.

Under those circumstances, what would be the rights of the plaintiff in error with regard to the Drum Lummon Vein?

Briefly stated the facts would be as follows: The St.

Louis Claim is a mining claim having a discovery vein running lengthwise of the claim as located and patented; consequently, the end lines of the claim as located would be the actual end lines of the claim; that is to say, they would be the lines which determine the direction of the planes which limit and control the right of the owner to follow the discovery vein on its dip, although such vein may so far depart from a perpendicular in its course downward as to extend outside of the vertical side lines of the surface of the St. Louis claim.

It is also well settled that the end lines which control and limit the extralateral right of the discovery vein are the end lines or planes which control and limit the extralateral right for every vein having its apex within the surface limits of the claim; therefore, still considering this question as though the St. Louis claim as patented had never included the Compromise Ground, it would seem quite clear that the St. Louis claim was entitled to all of the Drum Lummon vein between perpendicular planes passed through its end lines.

See Del Monte M. Co., vs. Last Chance M. C., 171 U. S., 57.

Walrath vs. Champion Mining Co., 171 U. S., 293.

It seems to us that there can be no doubt that these propositions are asserted by the two cases referred to. It seems to us that they hold that given a mining claim, it is entitled to follow all veins having their apexes within the surface grounds of the claim, to follow such veins on

their course downward and between the end lines of the claim, and that the owner of a mine is not limited in his right to work the claim on the dip by planes passed through the point of intersection of the vein with any side line of the claim. At the bottom of page 85, in the Del Monte case, the Court uses this language:

"All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior location of the New York."

If the line *e h* is prolonged, it will be found that there is no portion of that vein between the line *a d t* and the line *r s*, which has its apex in the New York, and that the words "so much of it as is not held by the prior location of the New York" can apply only to ore contained between the line *r s* and the line *e h* extended, and that portion of the vein does not have its apex within the New York, so that it is quite apparent that the Court in that case does give to the New York a portion of the vein on its dip which does not have its apex within the surface boundaries of the New York.

Now, referring to the Walrath case we meet this same proposition. On page 299, at the bottom, it appears that the trial court held that the line *g-h* and *a-p*, in the figure on page 295, constituted the end lines. But the same Court, notwithstanding this holding, in entering the de-

cree established the line *f-g* as the end line of the vein, and, quoting the exact words, "established this line as an end line of the Contact vein, but for its length only," and the Circuit Court of Appeals decided that the line *g-h-h* was the line which controlled the rights of the owner of the Providence Mine, and thus included a part of the Contact vein which had its apex outside of the surface boundaries of the Providence Mine.

But in this case the plaintiff (defendant in error) has not claimed ownership of any portion of the vein which has not at least a portion of its apex within the surface boundaries of the St. Louis claim: the portion of the vein involved in this controversy has a portion of its apex in the St. Louis Claim and a portion thereof in that portion of the Nine Hour Claim which is known as the Compromise Ground; and the St. Louis Claim being the prior in right, as to discovery, location and patent, it would have the prior right to the "Split Vein", even if that vein had been the discovery vein, and so "Split" by the side line from one end of the claim to the other.

> Bullion, Beck and Champion M. Co. vs. Eureka M. Co., 5 Utah, 3.

What then was the effect of the deed to the compromise strip executed under the order of the Court, and can the plaintiff in error show the circumstances surrounding the execution of the deed?

This point has already been argued to this Court in this brief.

It is claimed however by counsel for defendant that inasmuch as the vein enters and departs through the same line, there can be no extralateral rights to the vein on its dip. We do not consider that this proposition is correct.

We do not believe that even if this were the discovery vein that the rule of law for which counsel contends is correct, for even if this were the discovery vein, it runs lengthwise with the claim as located, its general course and direction is with the length of the vein as located and not crosswise thereof, and that would be enough to bring the case within the rules announced in the Del Monte case, for there is no law which requires that the located vein shall cross any line whatever. There is no law which prohibits it from entering a side line and crossing an end line, and no law which prohibits it from entering a side line and departing from the claim through the same side line. The course of the vein and its general direction, when that is shown, determine what are side lines and what are end lines, and that irrespective of any lines which it may or may not cross. (See the Del Monte case.)

However, this is not the discovery vein, as appears from the testimony of the witness Mayger, the witness Jenney, and the witness Parks (pp. 16, 17, 20, 21 and 22, Record in case No. 214). The discovery vein itself determines which are the end lines of the claim, as we have already said, and which are the side lines, and in this case it is shown from the evidence of the witnesses that the end

lines are those so declared to be by the locator of the claim by virtue of the location of the claim.

The owner of the St. Louis claim is entitled not only to the discovery vein, but to all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward and vertically, and, to quote from the Del Monte case:

> "Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the 'right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as

above described, through the end lines of their locations," etc.

Now, where is it found in this statute that, given a regularly located mining claim with the discovery vein running with the side lines of the claim in its general course, that the right of the owner of such claim is confined to such veins only as in their general course run lengthwise of the claim? Where is it to be found in the statute that his right to veins other than discovery vein is limited to any particular class of veins, or to any veins running in any particular way in their course or direction? The statute says that he is entitled to all veins, the top or apex of which lies inside of his surface lines extended downward vertically. All veins would include a vein which passes through both end lines, and it would also include a vein the top or apex of which is within the vertical side lines, although such a vein might in its course cross the same side line. This doctrine is, as we assert it, laid down in the case of Champion Mining Co. vs. Walrath, where, however, it is extended, so that the right to follow such a vein, even though it be not the discovery vein, is bounded only by planes passed through the end lines of the claim as such end lines are determined by the discovery vein.

It must be quite apparent that irrespective of the deed the right of the defendant in error to follow the vein in question between the planes is absolute, because it is a vein other than the discovery vein, having its top or apex within the surface boundaries of the St. Louis claim,

and the portion in question is well within the end lines of the claim.

What effect then did the deed have? Our contention is that the deed, when interpreted in the light of the surrounding circumstances, cannot be construed to convey any right to the plaintiff in error which its predecessor in interest did not have by virtue of the location of the Nine Hour; that location was subsequent to that of the St. Louis and could not include any portion of the vein in controversy.

In addition to the argument already made in this brief as to the effect of the deed, we call the attention of the court to one line of argument which was not made before, and also to a question which is involved in this branch of the case and which would not be reached by the decision upon the former argument.

First—In the former argument we neglected to call to the attention of the court that by the very terms of the decision and the findings of the state court in the case for specific performance it was declared that the agreement to execute this deed was made for the purpose of determining the boundary lines between the claims as well as to determine that the "compromise ground" was and always had been a part of the "Nine Hour Claim, and never a part of the St. Louis Claim. Now, then, it becomes quite important to consider what was the boundary line so agreed upon. If it had been an end line or a boundary line which was an end line,

there could be no doubt that that would determine extralateral rights, but, as a matter of fact, this boundary line which was agreed upon by the parties was the side line of the two claims, the east side line of the St. Louis claim and the west side line of the Nine Hour claim. It is quite apparent, then, that it being a side line which was established, it was not the intent of the parties to control the extralateral right of either of the parties to the agreement, because side lines have no effect upon extralateral rights.

The next point which we add to this question in addition to that already taken by us in this brief is this: If the deed to the Compromise Ground is to be interpreted as a common law deed, that is to say, so interpreted as to convey mineral in veins having their apexes outside of the Compromise Ground and within the surface boundaries of the St. Louis claim, then it must follow that it cannot be both a common law deed and a mining deed. If it conveys mineral in a vein having the apex of that portion of the vein in the St. Louis ground, it must be a common law deed, and the mineral so conveyed must be mineral which is contained underneath the surface ground of the compromise strip and within perpendicular planes passed through all of the lines of the compromise strip. Consequently if that is the meaning of the deed, and if that is the effect of the deed, it cannot convey any portion of the Drum Lummon vein having its apex within the St. Louis ground which portion is easterly of the east side line of the Thirty Foot Strip or compromise ground. To

put it in another way: Assuming that the deed to the compromise ground is a common law deed, then we reach this result: the plaintiff in error by virtue of its location, recordation and patenting of the claim was entitled and is entitled to all of the Drum Lummon vein having its apex within the planes mentioned, and that portion of the vein between the said planes to whatever depth, and by virtue of this so-called common law deed it conveyed to the defendant such a segment of that vein as is included within perpendicular planes passed through each and every of the lines of the Thirty Foot Strip, for we certainly did obtain patent and title to all that portion of the vein, and if we conveyed any portion of it, if any portion of it is to be considered as granted by the deed by virtue of the expression therein contained to the effect "together with all minerals therein contained", then the only mineral therein contained, even under the contention of counsel for defendant, would be the mineral contained within the perpendicular planes passed through all of the boundary lines of the compromise strip; for surely the defendant cannot lay claim to any portion of the vein between the 108 and 133 planes by virtue of any apex or by virtue of any right growing out of the ownership of the surface or by virtue of any law of the United States, and if it has any claim under the deed by virtue of the phrase so much relied upon, then it must be by virtue of the common law effect of the deed, and certainly the common law would convey no mineral not perpendicularly under the surface of the compromise ground. But

the whole theory of a common law deed as applied to the deed in question is to us absolutely absurd. We must construe this deed with reference to the subject which was known to both parties. In construing a deed to a mining claim it must always be remembered that the common law rights are not the rights of a mining claim, but that the owner of a mining claim has in some respects more and in some respects less rights than are ordinarily granted by a common law deed.

JURISDICTION OF THE FEDERAL COURT:

In a motion to dismiss the appeal in each of the Cases No. 213 and 214, we have already filed a brief raising the point that there was no Federal Question in either cause —and that, in Case No. 214, the judgment appealed from is in no sense a final judgment.

As the jurisdiction of the Federal Court is always a question which can be raised at any stage of a case, we submit the following:

There can be no doubt of the jurisdiction of the Circuit Court on the ground that the controversy is one between a foreign citizen or subject, and a citizen of the State of Montana.

It is true that the summons shows that there were parties defendant other than Montana Mining Company, Limited;—but it is equally true from the very nature of the action, which is an action for trespass upon real property, that they were not necessary parties to an

action brought to obtain a judgment against the defendant the Montana Mining Company, Limited.

The plaintff in error had the right to so amend its complaint, as to dismiss the action as to all defendants not indispensable parties; and as to the wrong complained of an action could have been brought against any trespasser, or any one aiding such trespasser. The right to amend the complaint so as to show jurisdiction in the Circuit Court, has been recognized in many cases decided in this Court; and that the defendant herein was, from the very nature of the case, the only necessary party defendant is settled in the following case:

Powers vs. Chesapeake & O. R. Co., 169 U. S. 92.

The amended complaint shows the fact that the plaintiff at all times mentioned in the complaint and at the time of filing such complaint was a corporation duly organized and existing under the laws of the State of Montana, and that during all of said time the defendant was a foreign corporation incorporated under the laws of Great Britain", etc.

Similar allegations have by this court been held sufficient as to the plaintiff corporation; and the sufficiency of the allegation as to the foreign corporation is sustained by the following cases.

Barrow Steamship Co. v. Kane, 170 U. S. 101.

National Steamship Co. v. Tugman, 106 U. S. 121.

Our conclusions are:—

First: That the appeal in each of the cases should be dismissed.

Second: That the judgment of the Circuit Court of Appeals in each of the cases should be affirmed on the merits.

All of which is respectfully submitted.

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